IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

ALBERT G. DICKINSON,

Petitioner,

against

E. LEWIS BURNHAM and JAMES A. VAUGHAN, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner.

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
SUMMARY STATEMENT	7
A. History of the Litigation	7
B. The Facts	8
C. The Decisions Below	15
REASONS RELIED ON FOR ALLOWANCE OF WRIT	17

Cases Cited

American Shipbuilding Co. v. Commonwealth S. S. Co., 6 Cir., 215 Fed. 296, 299	33
Andrews v. Equitable Life Ass. Society, 7 Cir., 124 Fed. 2d 788	20
Arnold v. Searing, 73 N. J. Eq. 262; 67 Atl. 831	33
Ayer v. Kemper, 2 Cir., 48 Fed. 2d 11, 14, 15, cert. den. 284 U. S. 639	24
Babcock v. Tam, 9 Cir., 156 Fed. 2d 116	29
Barrett v. Third Ave. R. R. Co., 45 N. Y. 628, 635	31
Beauknit Mills v. Eday Fabric Sales Corp., 2 Cir., 124 Fed. 2d 563	25
Brick v. Cohn-Hall-Marx, 276 N. Y. 259, 263	27

PAGE

Carr v. Thompson, 87 N. Y. 160 28

Coane v. American Distilling Co., 298 N. Y. 197..... 21

Cohen v. City Company of New York, 283 N. Y. 112, 117 27

Coleman Hotel Co. v. Crawford (C. A., Texas), 3 S. W. 2d 1109 32

Cwerdinski v. Bent, 256 App. Div. 612, aff'd 281 N. Y. 782 28

Deckert v. Independent Shares Corp. (E. D., Pa.) 39 Fed. Supp. 592, 123 Fed. 2d 979 18

Dickinson v. Mulligan, 2 Cir., 173 Fed. 2d 738..... 8

Dickinson v. Rinke, 2 Cir., 132 Fed. 2d 805, 806.... 7, 10

Dickinson v. Rinke, 132 Fed. 2d 884..... 7

Dickinson v. Rinke, 11 Federal Rules Service 489; 885 1

Dickinson v. Petroleum Conversion Corp., 338 U. S. 811 8

Dickinson v. Petroleum Conversion Corp., 338 U. S. 507, 515 ..... 8, 25

Dunlop's Sons, Inc. v. Dunlop, 259 App. Div. 233, aff'd 285 N. Y. 333..... 28

Edenborn v. Sim, 2 Cir., 206 Fed. 275..... 33

Ex-Mission L. & W. Co. v. Flash, 97 Cal. 610; 32 Pac. 600 33

Farmers Co-Op Oil Co. v. Socony Vacuum Oil Co. (D. C., Iowa), 43 Fed. Supp. 735, mod. on other grounds, 133 Fed. 2d 101..... 26

PAGE

Fidelity & Deposit Co. v. Queens County Trust Co., 226 N. Y. 225, 233 30

Frank v. Carlisle, 261 App. Div. 13, aff'd 286 N. Y. 586 28

Fulton Bank v. Hozier, 267 U. S. 276, 280 19

Fur Wool Trading Co. Ltd. v. Fox, Inc., 245 N. Y. 215 21

General Ins. Co. v. Goldstein, 45 N. Y. Supp. 2d 570 (not officially reported) 26

Georgia Power Co. v. Hudson, 4 Cir., 49 Fed. 2d 66, 68, 69 26

Gibson v. Shufeldt, 122 U. S. 27 19

Gobel, Inc. v. Hammerslough, 263 App. Div. 1, aff'd 288 N. Y. 653 ..... 27, 28

Gottfried v. Gottfried, 269 App. Div. 413, 418 28

Guild v. Hopkins, 271 App. Div. 234, 244, 245, aff'd 297 N. Y. 477 28

Gulf Coast Western Oil Co. v. Trapp, 10 Cir., 165 Fed. 2d 343, 350 32

Hackner v. Guaranty Trust Co., 2 Cir., 117 Fed. 2d 95, cert. den. 313 U. S. 559 24

Hammond v. Hopkins, 143 U. S. 224, 251 30

Hart v. Goadby, 72 Misc. 232 28

Hastings v. H. M. Byllesby Co., 293 N. Y. 404, 411 cert. den. 324 U. S. 860 27

Hearn 45th St. Corp. v. Jano, 283 N. Y. 139 27

Hoffman v. McClelland, 264 U. S. 552, 558 19

PAGE

Horseshoe Pier Amusement Co. v. Sibley, 157 Cal. 442, 108 Pac. 308 32

Independent Shares v. Deckert, 3 Cir., 108 Fed. 2d 51, rev. on other grounds, 311 U. S. 282..... 26

Koppitz-Melchors Inc. v. Koppitz, 315 Mich. 582, 24 N. W. 2d 220 33

Lammer v. Stoddard, 103 N. Y. 672 28

Lawrence v. McCalmont, 2 How. 426, 452 31

Leadville Coal Co. v. McCreery, 141 U. S. 475..... 21

Lion Bonding Co. v. Karatz, 262 U. S. 77, 87, fn. 4.... 19

Little v. Haas, 68 Fed. Supp. 545 (D. C., Ga.)..... 29

McNamara v. Eastman Kodak Co., 232 N. Y. 18, 23, 25 31

Magnolia Petroleum Co. v. McFall, 178 Ark. 596, 12 S. W. 2d 15 31

Mason v. Henry, 152 N. Y. 529, 539 .....23, 24

Meyer v. Hurley Motor Co., 273 U. S. 18, 24..... 27

Meyer v. Meyer, 271 App. Div. 465, 476 28

Milks v. McIver, 264 N. Y. 267, 269..... 31

Miller v. National City Bank, 166 Fed. 2d 723, 728.... 24

Mills v. Mills, 115 N. Y. 80 28

Newsom v. E. I. Dupont DeNemours, 6 Cir., 173 Fed. 2d 856 20

Pennsylvania Co., etc. v. Deckert, 3 Cir., 123 Fed. 2d 979, 985 21

Petroleum Conversion Corp. (Vaughan) In re:, 99 Fed. Supp. 899 15

PAGE

Pollack v. Warner Bros., 266 App. Div. 118 28

Raabe Glissman Co., In re:, 71 Fed. Supp. 678, 680.. 20

Richmond v. Irons, 121 U. S. 27 .....20, 21

San Joaquin L. & W. Co. v. West, 94 Cal. 399, 29 P. 785 32

Sherwood v. U. S., 2 Cir., 112 Fed. 2d 587, 591; rev. on other grounds, 312 U. S. 584 25

Sielcken-Schwartz v. American Factors Ltd., 265 N. Y. 239 30

Steele v. Guaranty Trust Co., 2 Cir., 164 Fed. 2d 387, 388 20

Stewart v. Dunham, 115 U. S. 61 19

Stewart v. King, 85 Ore. 14, 166 Pac. 55, 57..... 32

St. Louis & S. F. R. R. v. Spiller, 8 Cir., 274 U. S. 304 20

Sturgeon v. Great Lakes Steel Corp., 6 Cir., 143 Fed. 2d 819; cert. den. 323 U. S. 799..... 20

Teich v. Lawrence, 291 N. Y. 245..... 27

U. S. v. Christopher, 10 Cir., 71 Fed. 2d 764..... 29

U. S. v. Jefferson, 291 U. S. 386, 403..... 27

Walsh v. N. Y. C. & H. R. R. Co., 204 N. Y. 58, 62.... 31

Wechsler v. Bowman, 285 N. Y. 284, 293, 294..... 27

Wiser v. Lawler, 189 U. S. 260..... 28

Wood v. Young, 141 N. Y. 211..... 28

York v. Guaranty Trust Co., 143 Fed. 2d 503; rev. on other grounds, 326 U. S. 99..... 24

Statutes Cited

PAGE

New York C. P. A. §48(5) (Laws of 1920, C. 925) 3, 4-5, 23, 27, 28

New York Debtor & Creditor Law §243 (L. 1936 c. 222) 31

New York Personal Property Law §33, subd. 2 (L. 1936, c. 281) 31

Title 28, U. S. Code §1254(1) 2

Texts Cited

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PAGE

Notes of Advisory Committee on Rules, Rule 23(a) (clause 2) 19

Note, "Federal Class Actions: A Suggested Revision of Rule 23", (1946), 46 Col. L. R. 818, 822-3.... 18

Proceedings of American Bar Assn. Institute on Federal Rules, 1938, p. 264 17

Restatement, Restitution, pp. 23, 523..... 27

Restatement, Restitution, §160 comment "i", p. 649..20-21

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Federal Rules Cited

Federal Rules of Civil Practice:

Rule 23(a) 2, 17

23(a)(2) 2, 16, 18

23(a)(3) 2, 16, 18

26 26

38 26

52(a) 16

82 20

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Albert G. Dickinson, respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, in the above entitled case, entered June 24, 1952, affirming interlocutory and final judgments of the District Court for the Southern District of New York, entered April 10, 1947 and August 3, 1948, in the sum of $408,949.57 in favor of respondents and against petitioner and defendant, Fred B. Lloyd, and affirming certain intermediate orders.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit (R. 1069) filed on June 24, 1952 has not been reported. One of the opinions of the District Court is in part reported at 11 Fed. Rules Serv. 489; see also *id.* 885.

Jurisdiction

Jurisdiction to issue the writ requested is found in Title 28, United States Code, §1254(1).

Questions Presented

1. Rule 23(a) of the Federal Rules of Civil Practice provides, so far as is here relevant:

Rule 23. Class Actions

> (a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the Court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
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> • • •
>
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
>
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

(a) Is a class action on behalf of subscribers to a stock subscription agency, to recover secret profits allegedly obtained out of the subscription monies by breach of fiduciary duty and fraud and deceit, a "spurious" class action [F. R. 23(a)(3)] as held by the District Court, or a "hybrid" class action [F. R. 23(a)(2)] as held by the Court of Appeals, where the object of the action was solely money judgments, there was no "specific property involved", or

in the custody of the Court, and there was neither allegation, proof nor finding of the existence at the time of suit, of the monies allegedly misappropriated seventeen years before?

(b) If a "spurious" class action, do constitutional and statutory limitations on federal district court diversity jurisdiction, permit members of the class, their rights being several, to intervene after interlocutory judgment in favor of the class generally, and recover individual judgments, despite the failure to plead or prove diversity citizenship or that their respective claims were in a jurisdictionally sufficient amount?

(c) In either view, was the District Court empowered (1) to bar the claims of absent members of the class who failed to intervene, or withdrew after intervening, to whom registered mail notice had been sent advising them of the interlocutory judgment in favor of the class, and giving them opportunity to intervene and assert their claims, but containing no warning that in event of failure to do so, their claims would be barred, and (2) to award the total amount of the barred claims, including those of the members who did not receive the notice, *pro rata* to the members of the class who appeared and prosecuted their claims?

(d) New York Civil Practice Act, §48(5) (Laws of 1920, c. 925) provides:

> "Actions to be commenced within six years. The following actions must be commenced within six years after the cause of action has accrued:
>
> • • •
>
> 5. An action to procure a judgment on the ground of fraud. The cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud."

The Court of Appeals of the State of New York has held that in an action based upon fraud, begun more than six years after the acts constituting the fraud, the burden of proof rests upon the plaintiff, in order to overcome the defense of limitations, to prove that he first discovered the facts within six years before suit. In a class action to procure a judgment on the ground of fraud, instituted in a New York federal district court more than seventeen years after the fraud, did each member of the class, intervening after interlocutory judgment in favor of the class generally, have the burden of proving when he discovered the facts, or did he take *prima facie* the dates of discovery open to the class representative, thereby imposing upon the defendant the burden of rebutting such presumption, which he would not have if the interveners had brought separate suits on their several claims?

(e) Did the defendant to a class action to recover secret profits allegedly obtained as a result of breach of fiduciary duty and fraud and deceit, seeking and resulting in money judgments only, have a right to jury trial and to an examination before trial as to the claims of members who intervened after interlocutory judgment in favor of the class generally, with respect to issues raised by defendant's answer to each claim and particularly with respect to claimant's reliance upon the alleged misrepresentation, his contemporaneous notice and knowledge of the facts and the time of his discovery of the alleged fraud; or if such issues were adjudicated by the interlocutory judgment, was such interlocutory judgment erroneous in determining, not only the common questions of law and fact, but also such issues, personal to each member of the class, including those who had not theretofore intervened, and some who never intervened?

2. Where, under the decisional law of the forum, the state statute of limitations (New York Civil Practice Act,

§48(5) *supra*, p. 3) governing fraud actions, does not apply unless the essence of the action is actual, common-law fraud as distinguished from constructive fraud, is an action by subscribers to a stock subscription agency, to recover secret profits obtained by petitioner out of the subscription monies through breach of fiduciary duty, converted into an action for actual fraud within the statute, on the theory, unnecessary to the recovery, that the subscribers were induced to subscribe by statements as to the use to which the subscriptions were to be put, which statements were false in that the subscriptions were used for the profit of the petitioner?

3. Where subscribers to a stock subscription agency for a corporate reorganization seek the recovery of alleged secret profits paid out of subscription monies by the Agent to petitioner in connection with the resale of a plant, formerly owned by the old corporation, which had been purchased by petitioner, a non-fiduciary, with his own means, for a large sum, at a lien foreclosure sale, are the subscribers charged, as a matter of law, with contemporaneous notice and knowledge of such payments to petitioner, on the grounds that the documentary evidence establishes that the Subscribers were expressly informed, by recitals in the subscription agreements or by letter (a) of the lien foreclosure sale; (b) the purchase of the plant by petitioner; (c) the plan to repurchase it for the new corporation through the Agent, with Subscribers' payments; (d) the subscription agreements authorized the Agent, without restrictions, to apply the monies paid thereunder for the acquisition of said plant or an interest therein; (e) the Subscribers were informed that as of a specified date there was due a balance for "liens" to be paid by the Agent in the amount approximately then due petitioner under the agreement by the Agent to pay petitioner the face amount of the liens for the plant; and there is neither finding nor

proof that any subscriber was misinformed as to the terms of the purchase or sale by petitioner, and 158 of the 161 subscribers failed to testify, and the overwhelming majority of both the boards of the old and the new companies and the bondholders protective committee which sponsored the reorganization, were large subscribers?

4. Does a release to one joint tort feasor fail to operate as a release to the others, merely because as to them, it was gratuitous?

5. Where a stock subscription agency is created by an insolvent corporation to raise capital and finance its operation, and the corporation is thereafter reorganized, the agency continuing for the subscription for stock of the new corporation, the agent being irrevocably authorized by the subscribers to expend the monies received for corporate purposes pending its organization, and thereupon to turn the balance over to the corporation, and accept stock therefor for the subscribers, and at and after its formal organization the agent turned over to such new corporation all of the unexpended monies received by him, and corporation issued and the subscribers thereafter received stock for the total amount of monies paid to the agent, and with knowledge of the facts since 1938, they have retained said stock and have not rescinded their subscriptions, does the cause of action to recover the subscription monies allegedly fraudulently misappropriated by the agent and paid the petitioner during such reorganization belong to the new corporation or to the subscribers?

Summary Statement

A. History of the Litigation

In 1938, plaintiff-petitioner, Albert G. Dickinson, commenced an action in the United States Court for the Southern District of New York, against the defendant Lloyd and others, to impress an equitable lien upon certain stock of Petroleum Conversion Corporation issued in the name of Lloyd. The complaint was dismissed but judgment was reversed on appeal and a new trial ordered (*Dickinson* v. *Rinke*, 132 Fed. 2d 805; see, also, *Dickinson* v. *Rinke*, 132 Fed. 2d 884). After remand, in 1944 Burnham and Vaughan, on behalf of themselves and other Subscribers to a subscription agency for the stock of Petroleum and its predecessor, Knox Process Corp., were allowed, on consent of plaintiff, to intervene. They attacked the issuance of stock involved in plaintiff's action, and pleaded a counterclaim for the recovery of $87,310.28 for secret profits realized in 1926 through breach of fiduciary duty. Petroleum also intervened, making the same general allegations and demands for relief. The triangular controversy was tried and in 1947 a decree was entered dismissing the claims of plaintiff and Petroleum and awarding a judgment in favor of the class generally in the sum of $176,245.24 with interest from 1926 (R. 319).[1] Dickinson appealed from this judgment (R. 591-3); Petroleum did not.

Pursuant to said judgment, notice was sent to the 159 absent members of the class to intervene and assert their claims; 32 were not located (1513); 83 intervened and filed claims (1512-13), but 13 thereafter withdrew (1517-18; R. 1075). In accordance with the order granting intervention (R. 323-25), petitioner interposed an answer to the

[1] Figures in parentheses refer to folio numbers unless preceded by the letter "R" indicating pages of the record.

individual claims (R. 416-21) and demanded a jury trial (R. 421) and served notice to take the individual depositions of certain of the new intervenors (R. 428). The jury demand and said notice to take depositions were vacated (R. 445; R. 422). A trial of the issues raised by plaintiff's answer was had (1524). A final decree was entered in 1948 granting Vaughan and Burnham and the 70 other claimants, individual judgments for the full $176,245.24 plus interest totaling $408,949.57 (R. 581-90). Both Dickinson and Petroleum appealed from this judgment (R. 1071). Dickinson's motion to dismiss Petroleum's appeal was denied (*Dickinson* v. *Mulligan*, 173 Fed. 2d 738). This Court granted certiorari (*Dickinson* v. *Petroleum Conversion Corporation*. 338 U. S. 811) and the dismissal of Petroleum's appeal was ordered (338 U. S. 507).

On Dickinson's appeal, the Court of Appeals for the Second Circuit affirmed the interlocutory and final judgments in favor of the Subscribers who intervened and certain intermediate orders appealed from (R. 1069-82).

B. The Facts

The documentary and uncontroverted evidence shows: Knox Process Corporation ("Knox" hereafter), a Delaware corporation was organized in 1923 (615-16) to develop a pilot-plant tested oil cracking patent (2639, at p. 38 of Exh. 113), which ultimately proved a failure for commercial purposes (2153-54). A million dollars had been invested and lost in a predecessor, U. S. Gasoline Mfg. Corp., organized in 1921 (613-14). Knox sold $890,000 of bonds at 95 (623), but by the end of 1924 it was acutely insolvent (629; 1938-39; 1975; 2057; 2297; 2417; 2494). Its sole assets consisted of the patent, 143 acres of land at Texas City, Texas, and on a part thereof, a commercially inoperable oil cracking plant based on the patent (618;

627-29). These assets were covered by a mortgage securing the bond issue (255; 617; 2348). Upwards of $160,000 of mechanics liens had been filed against the plant (18; 145-16; 295; 2534).

At this point the company turned to the petitioner, Dickinson, who had, by mail (2081), purchased and paid for $20,000 of Knox bonds, one of the largest single sales (623). He was never a Knox officer, director or employee (648). In November, 1924, the Knox Board gave Lloyd, authorized to call himself "Acting President"[2] (628), *carte blanche* to make any contract he deemed advisable with Dickinson in connection with a plan for the refinancing of the liens, the company's most pressing problem (642). Lloyd made various propositions to induce Dickinson to buy in the liens, upon the assurances of profit and that he, with the knowledge of the company would be Dickinson's trustee and watch over Dickinson's investment (2420; 2426; 2454-58; 2465-66; 2475; 2478; 2483). Knox, used Dickinson's credit standing and cooperation to obtain a temporary stand-off arrangement with the lienors (2493-94; 304). And, in express consideration of Dickinson's services, it voted Dickinson 20,600 shares of its then and ever after worthless but potentially valuable stock (1973; 2502).[3] In March, 1925, Dickinson and Lloyd entered into a Knox stock-pooling agreement (2374-82). The stock pool consisted of Dickinson's 20,600 shares and Lloyd's 80,000 shares, promotion receipts to which he was entitled in connection

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[2] There was no such office (3153).

[3] Simultaneously, Knox proposed to Dickinson, and Dickinson accepted its proposal, that if he acquired any of the liens, he would surrender the same to the company in exchange for its stock at par, for the cash used by him in the acquisition thereof (292, 293, 2499, 2635). [He was expressly under no obligation to buy in (2501, 2796) and never succumbed to this stock selling scheme.]

with the U. S. Gasoline Mfg. Corp. reorganization resulting in Knox (263-67; 299-300; 2442; 2489; 2621; *Dickinson* v. *Rinke*, 132 Fed. 2d 805, 806).[4]

In the meantime, in December, 1924, the company determined to raise immediately another $600,000 of capital (478; 2592; 2738-39; 2753), but less than $30,000 was obtained in the two months following (635). At the end of February, to avoid seizure of the new monies by Knox creditors (19; 20), the so-called "Rinke Agency" was created pursuant to a Knox Board resolution (288-92; 629). Instead of having the funds paid to Knox, they were to be paid to its attorney and director Rinke, under stock subscription agreements[5] authorizing Rinke to make expenditures thereof to carry on the company's business pay its obligations, operate and improve the plant, and buy in or liquidate the liens thereon (2723-33).

The form of these stock subscription agreements, providing for installment payments[6] had to be repeatedly altered and made more attractive to the investor. Each new form contemplated the subscription of the then balance of the $600,000 (631).

But the receipts were hardly adequate to "keep the doors open", that is, maintain and improve the plant, pay the staff of engineers, etc., and maintain the New York office (2011-13). The bill for electricity at the plant alone

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[4] Significantly, Dickinson was given complete discretion over the pool (2377-81) although he had suggested merely an equal division (300; 2511-12). For Lloyd's curious explanation, see fol. 312. By such methods Lloyd had already so wormed himself into Dickinson's good graces, that Dickinson entered with Lloyd into the so-called Ozokerite deal [having nothing to do with this action (299)] wherein Lloyd obtained an equal interest but Dickinson put up all the monies (301; 2513).

[5] The Knox authorized capital stock was increased to 1,200,000 shares, par value $5 each (693, 1886, 2561).

[6] Each subscription was a separate and individual contract between the subscriber and Rinke and was payable without regard to any other subscriptions; none of the subscribers was given a right or interest in the monies paid by any other subscriber; no provision was made for a common fund (2723-57).

ran about $4,000 a month (2386). In June 1925 the bondholders formed a Protective Committee with full powers to reorganize Knox (662). The investors' interest petered out (2804). The third Agency form of subscription produced $800 (638). On October 28, 1925 the judgment of lien foreclosure was entered for $174,620.56 (297) and a sale of the plant and fifty acres adjoining was ordered (654-55; 2331-33; 2339; 2344-45). The Rinke Agent bank balance three days after the judgment, was $21,946.40 (1942) exclusive of $4,000 borrowed from Dickinson and others, in order to carry on (654; 1944-46; 1974; 2654). His monthly balances during the preceding months had been even less (1942).

Some months before, in July, 1925, Dickinson had inquired whether, if he bought in the liens for half cash and half Knox stock at par, the company or the Agent would (when financially able, of course) buy back the liens at face amount in cash (318-19). In response, Rinke suggested that such arrangement be between Dickinson and himself as Agent, the liens, when paid for, to be surrendered to the company for stock to the Subscribers (319-20). He informed Dickinson that "the directors and also the substantial subscribers to the Agency account all thoroughly comprehend that someone is to buy up the liens and then sell them to me as Agent at face amount"[7] (320).

Dickinson, however, did not act on this proposal to buy in the liens. Instead, five months later, in December 1925, he bought in the plant at the lien foreclosure sale (297, 2781-82) for the amount of the lien foreclosure judgment, and paid half thereof, $87,310.28 in cash, and undertook together with Lloyd (their stock being pooled) to deliver

[7] Of the 161 subscribers (1024-46) 18 who paid almost half of the total subscriptions (2784), men of outstanding business and professional experience (2518-20) were the overwhelming majority of both the Boards of the old and new companies (2281-2; 2709) and of the Bondholders Protective Committee (662) which sponsored the reorganization (2746-7).

one year later, a like amount of stock at par of either Knox or the new company acquiring the property[8] (657-58; 2285-87; 2290-2303; 2567).

Rinke's free net balance just before the sale on November 30, 1925, was $32,668; at the end of December, it was $5,000 less (653-54). There was no finding by the trial court that Rinke, as Agent, in December, 1925, at the time of the sale or before, had the means to equal Dickinson's bid or even the cash portion thereof.

Simultaneously, but unbeknown to Dickinson (340-44; 2136-38) the Bondholders Protective Committee had secured judgment foreclosing the mortgage on the patent and balance of the Knox assets (245; 344; 666). His bid had been made on the assumption that Knox was to continue (2782). Indeed, only two weeks before, the Knox stockholders had authorized an increase in the capital stock from $6,000,000 to $10,000,000 (2764-72). The Committee, however, immediately knew of the lien foreclosure sale and Dickinson's purchase (2577). The Committee members were all large Agency Subscribers and 3 of the 5 were Knox directors (662-64).

The general plan for the reorganization of the enterprise, made necessary by the mortgage foreclosure, was first outlined to Dickinson after the acceptance of his bid (343, 346) as follows: a new company was to be organized; the Bondholders Committee was to acquire, through Rinke as its Agent (2577) at the mortgage foreclosure sales, the former Knox assets other than the plant and property purchased by Dickinson; Dickinson was to sell the plant and land acquired by him to Rinke, as Agent, and to receive therefor out of future Agency funds, $174,620.56, the face amount of the liens for which he had bought in the prop-

[8] Lloyd in a partial accounting to Dickinson took credit for the stock delivered and to be delivered by him to the lienors (2621-2).

erty, and Rinke, as Agent, and the Bondholders Committee would then transfer to the new company, all the former Knox assets. The distribution of stock thereof would be "equitable to everyone interested", including the Knox Bondholders (344), and presumably the Subscribers, and of course, Dickinson (2585) and Lloyd who held under their stock-pooling agreement, about 100,000 Knox shares (263-67; 299-300; 2442; 2489; 2621). Dickinson made his agreement with Rinke in accordance with the plan above described (2596-2610).

To implement the plan for reorganization, a fourth form of Agency agreement was issued, under the sponsorship of the Bondholders Committee. It informed the Subscribers of the sale of most of Knox's physical assets (the plant and 50 acres) at the lien foreclosure sale and the imminent mortgage foreclosure sales of the balance of the Knox properties. Rinke was irrevocably authorized to apply the monies paid thereunder, for the acquisition of the former Knox properties for the new company, the improvement and continued operation of the plant pending the reorganization, and to accept stock of the new company at par for such monies, both expended and unexpended (2746-49). An amendment to the second Agency agreement by the Subscribers thereof, had specifically authorized Rinke to acquire the plant with subscription payments from the purchaser, whoever he would be, at the lien foreclosure sale (351-52; 1937-38; 2734-35). The amount to be paid for the plant or other Knox properties was not limited by any of the subscription agreements. Nor was there any restriction as to profits to the vendor, Dickinson, a non-fiduciary (594). No proof was adduced nor is there any finding that any of the Subscribers were misinformed as to the agreement with Dickinson for the payment to him of the amount of the liens. 158 of the 161 Subscribers failed to testify.

The new company, Petroleum Conversion Corp., a Delaware corporation, with an authorized capital stock of 1,200,000 shares, par value $5 each, was incorporated in March but not formally organized until December, 1926 (667-68). During the intervening period the venture struggled to obtain the balance of the $600,000 (639). Rinke's receipts for each of six of the first seven months of 1926 were less than his disbursements (2777-78; 2808). On July 1, 1926 Rinke had less than $5,000 on hand (480).[9]

Then, a fifth form of Agency agreement, giving the Subscribers "two for one" (2752-57), *i.e.* two Petroleum shares for each $5.00 paid, plus a direction by the Bondholders Committee to give the past Subscribers the same "two for one" (2594-95), plus Dickinson's underwriting of the subscription of the then balance of the $600,000 by pledging the unpaid amount of the $174,000 due him (2632-35), resulted in the subscription of the balance of said $600,000 during the next five months except for the sums collected in 1927 (1941; 1997-99).

After the subscription had been completed and Dickinson had been paid in instalments $174,620.56 for the plant[10] during a period of about 11 months (659-61), and Rinke had turned over to the company the unexpended balance of the Agency receipts (458-61; 1930-34; 1941; 1964; 2398; 1997-99), Petroleum, nominally in exchange for the former Knox properties owned by Rinke, as Agent, and by Dickinson, voted the issuance of all of its authorized capital

[9] In a letter of that date to the subscribers asking for additional subscriptions he pointed to the facts that Petroleum was to acquire the plant, with Agency funds; that the plant had been purchased at the lien foreclosure sale by Dickinson with his own funds and "guarantees" (to the lienors) (479).

[10] For delay in payment of the first $87,000, Dickinson asked for and was paid interest thereon at a rate equal to the amount he had to pay his bank on a loan to finance the cash part of the purchase price paid by him for the plant (387-8); the second $87,000 was paid directly to Lloyd and he remitted only $30,000 thereof to Dickinson (661-2).

stock (675; 2267-71) so as to distribute its stock to make it a "replica of the Knox Process Corporation in financial structure" (269-75) on a "two for one" basis.

Thus, Rinke, as Agent of the Subscribers, was voted and received a certificate for 240,000 shares, par value $1,200,000, exactly twice the $600,000 subscribed (508-9; 681; 1981), and as Agent of the Bondholders Committee, 350,400 shares, par value $1,752,000, exactly twice the face amount of the $876,000 of Knox bonds deposited with the Committee (23; 2311-16). The balance of 609,600 shares was voted to Dickinson, pursuant to plan, to obtain issued stock, 140,000 shares going to the treasury (2229; 2240); about 350,000 to certain Knox stockholders and creditors (270-1; 275; 373; 379; 380; 432; 2261; 2720). The balance remaining approximates on a "one for one" basis the 100,000 Knox shares to which Lloyd and Dickinson were entitled at the time of their stock-pooling agreement (*supra*, pp. 9-10; 681; 1523-24). Actually, Dickinson at no time received any part of the stock voted to him (687-90). The Rinke Agency Subscribers, however, in 1937 did receive separate certificates for their Petroleum stock (494) and each of them executed a general release to Rinke (734-37; 2407-12). The stock has been retained with knowledge of the facts allegedly discovered in the latter part of 1938 (29) and the releases were not rescinded. In 1938, after a settlement of mutual claims and exchange of general releases, Petroleum elected Dickinson a director (716-19). In 1948 it was adjudicated a bankrupt. *In re Petroleum Conversion Corp.* (*Vaughan*), 99 Fed. Supp. 899.

C. The Decisions Below

The District Court granted judgment in favor of the Subscribers on the ground that the monies paid to Dickinson and Lloyd had been misappropriated to them through

the connivance of their fiduciary Rinke for which the Subscribers got nothing; it held the Subscribers did not discover the facts until 1938; that the claim did not belong to Petroleum; and that the action was not barred by the statute of limitations. The defense of the release given to Rinke by the Subscribers was also overruled. The District Court held that the suit on behalf of the Rinke Agency Subscribers was a spurious class suit within the provisions of Federal Rule 23(a)(3) (516-21; 1414-16; 1733-34). It found compliance with diversity jurisdictional requirements even though neither Vaughan nor Burnham nor the subsequent intervenors pleaded or proved diversity citizenship, and none, other than Vaughan, pleaded a claim in a sufficient jurisdictional amount, and in almost all instances such claims are for less than the jurisdictional amount. (Vaughan and Burnham amended the pleadings, and the record on appeal, by leave of the Court of Appeals by adding a conclusory affidavit of citizenship (R. 1055-68). The trial court also barred the claims of the 89 non-appearing Subscribers and awarded the amount of such claims *pro rata* to the 72 Subscribers who appeared.

The Circuit Court of Appeals affirmed the judgment below on the merits, by reason of the "clearly erroneous" rule [F. R. 52(a)], although it recognized that Dickinson's "exculpatorily innocent interpretation of the events" was based upon "the documentary and uncontroverted evidence" (R. 1071; R. 1074).

As to the procedural issues it upheld the adjudication below as to the jurisdictional, *res judicata* and due process questions but on the ground that the action was a hybrid class action [F. R. 23(a)(2)] to recover property held in constructive trust (R. 1078-79). As to the *vacatur* of petitioner's demand for jury trial of the personal issues relating to the subsequent intervenors and of the notice for

their examination before trial, it was held that the issues were *inter se* the intervenors and that the class suit was an equity device (R. 1080). The defense of the release given by the class to Rinke was overruled on the ground that it cannot avail Dickinson and Lloyd as to whom it was gratuitous (R. 1080), and as to the statute of limitations, it was held that this was an action for common law fraud which did not accrue until discovery of the facts, on a new theory that the subscribers were induced to subscribe by statements as to the use to which the subscriptions were to be put, which were false in that they were used to profit the petitioner (R. 1080-81).

Reasons Relied on for Allowance of Writ

A

1. The opinion of the Circuit Court of Appeals attests that "Dickinson's appeal raises important questions both substantive and procedural" (R. 1071). Among the latter are the issues arising out of the class suit procedure. These bring to the fore complex jurisdictional and due process problems which long have troubled the profession and the courts. Fifteen years ago, Professor Moore wrote:

> "The law on class actions is inextricably bound up with jurisdiction and the binding effect of the judgment, and because of these complexities is in a confused state."[11]

Federal Rule 23(a) does not and was expressly not intended to resolve these problems.[12] The intervening years have

[11] Moore *"Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft"*, 25 Georgetown L. J. 551, at 571.

[12] Proceedings of American Bar Assn. Institute on Federal Rules 1938, p. 264.

failed to resolve the confusion. Class suits are still described as "this wilderness".[13] That "the task of pigeonholing operative facts into one of the three categories as a 'true', 'hybrid' or 'spurious' suit has baffled both courts and commentators,"[14] is illustrated by a conflict between upper and lower courts on the same state of facts,[15] and indeed, in this very case itself, where the trial court's considered and repeated judgment (516-21; 1414-16; 1733-34) that this was a spurious class action, was discarded by the Court of Appeals, and the counterclaim denominated a hybrid class action (R. 1076, 1078).

2. This determination raises novel questions of federal law of widespread importance which should be settled by this court.

The decision below, it is submitted, runs counter to the provisions of Federal Rule 23(a)(2) itself and is probably in conflict with the applicable decisions of this Court with respect to the constitutional principles involved. It turns in part upon the substantive law of constructive trusts (R. 1078). In that phase, it decided an important question of local law in a way probably in conflict with applicable local decisions by the highest courts.

In contrast to the requirements of a hybrid class action, as set forth in Federal Rule 23(a)(2) wherein "the object

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[13] Keeffe, Levy & Donovan, *"Lee Defeats Ben-Hur"* (1948), 33 Corn. L. Q. 327.

[14] Note, *"Federal Class Actions: A Suggested Revision of Rule 23"* (1946), 46 Col. L. R. 818, 822-3; see, also, McLaughlin, *"The Mystery of the Representative Suit"*, 26 Georgetown L. J. 878; Kalven & Rosenfield, *"The Contemporary Function of the Class Suit"* (1941), 8 U. of Chi. L. R. 684; *Gordon, "The Common Question Class Suit Under the Federal Rules and in Illinois"* (1947), 42 Ill. L. R. 518.

[15] *Deckert v. Independent Shares Corp.* (E. D., Pa.), 39 Fed. Supp. 592, 123 Fed. 2d 979.

of the action is the adjudication of claims which do or may affect specific property involved in the action", the object of this action is solely money judgments (32-33), and such was the relief granted (1754-70). There is here no "specific property involved". Certainly not in the sense of the typical hybrid class action,[16] a creditor's bill for the receivership of an insolvent debtor's property. *Gibson* v. *Shufeldt*, 122 U. S. 27.

A hybrid class action, though an *in personam* suit as to the determination of the several claims of the members of the class, is an *in rem* proceeding as to the specific property in the custody of the court.[17] Absent such property in *custodia legis*, an action on behalf of the class whose rights are several, is merely a spurious class action, and there is then wanting ancillary jurisdiction. *Hoffman* v. *McClelland*, 264 U. S. 552, 558; *Fulton* v. *Hozier*, 267 U. S. 276, 820. Only in the exercise of ancillary jurisdiction may a District Court within the confines of the constitutional and statutory limitations upon its jurisdiction permit, in non-federal cases, a failure to comply with diversity jurisdictional requirements by intervening claimants whose rights are several. *Stewart* v. *Dunham*, 115 U. S. 61; *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, 87, fn. 4; and it is on this basis that the Court of Appeals below sustained the District Court's jurisdiction for the adjudication of the claims of the subsequent interveners in this class suit despite the fact that they neither pleaded (1014-16; 1020-23; 1485-88) nor proved diversity citizenship, or that their separate claims were in a jurisdictionally sufficient amount,

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[16] See Notes of Advisory Committee on Rules, Rule 23(a) (clause 2).

[17] 3 *Moore, Federal Practice*, 2d ed., ¶ 23.11 [4], p. 3468.

although such would have been their burden had they brought separate suits.[18]

3. The Court of Appeals predicated its holding upon the ground that the District Court had "tak(en) charge of the fund" consisting of the monies allegedly misappropriated in 1926, "in the hands of the" petitioner (R. 1078), although there is neither finding nor proof that the 1926 payments were segregated, or were even in existence at the time of suit in 1944. But says the Court "what we have here is proper(t)y in constructive trust by reason of fraud" on the Subscribers (R. 1078). This conclusion appears to be directly in conflict with *St. Louis & S. F. R. R.* v. *Spiller,* 274 U. S. 304, which held that a constructive trust does not apply to monies illegally obtained by defendant, where such monies were not shown to have been segregated and are not identifiable at time of suit. "It may have been spent", said the Court, at page 310.

"A constructive trust no longer continues when the person chargeable as trustee no longer holds the property or other property which is its product." Restatement, *Restitution,* §160, comment "i", p. 649. That the existence of

[18] The Court of Appeals tacitly acknowledged the validity of petitioner's contention that in a spurious class action the existence of diversity jurisdiction as between the class representatives and the defendants to the class suit, is insufficient to sustain jurisdiction as to the claims of subsequently intervening class members, since a spurious class action is merely a joinder device and "is in effect but a congeries of separate suits so that each claimant must, as to his own claim, meet the jurisdictional requirements". *Steele* v. *Guaranty Trust Co.* (2d Cir.), 164 Fed. 2d 387, 388; *Newsom* v. *E. I. Dupont DeNemours* (6th Cir.), 173 Fed. 2d 856; see, *Andrews* v. *Equitable Life Assurance Society* (7th Cir.), 124 Fed. 2d 788 (MINTON, J.) and cases therein cited.

The District Court's distinction between original parties and subsequent interveners (418) is without validity since an intervener is for all intents and purposes an original party. *Richmond* v. *Irons,* 121 U. S. 27; *In Re: Raabe Glissman Co.,* 71 Fed. Supp. 678, 680 (D. C., N. Y., S. D., LEIBELL, J.). The "original party" approach has properly been labeled a trick for escape from the constitutional limitations on District Court jurisdiction. Kalven & Rosenfield, *"The Contemporary Function of the Class Suit"* (1941), 8 U. of Chi. L. R. 684 at 704, n. 66; McGovney, *"A Supreme Court Fiction"*, 56 Harv. L. R. 1090, 1111-15. Rule 82, F. R. C. P. prohibits such device for the expansion of District Court jurisdiction, *Sturgeon* v. *Great Lakes Steel Corp.* (6th Cir.), 143 Fed. 2d 819, certiorari denied 323 U. S. 799.

specific identifiable property which the trustee can be compelled to convey is a condition precedent to the imposition of the constructive trust, has been held by the highest courts of the forum with which, at least in principle, the holding below is in conflict. *Coane* v. *American Distilling Co.*, 298 N. Y. 197; *Fur Wool Trading Co. Ltd.* v. *Fox, Inc.*, 245 N. Y. 215.[19]

The passing reference to the application of a hybrid class action to a fund held in constructive trust, in *Pennsylvania Co. for Ins., etc.* v. *Deckert* (3d Cir.) 123 Fed. 2d 979, 985, relied on by the Court of Appeals, is here without force, since the fund referred to in that case was monies then in existence, in the hands of a party to the action, but which had no personal claim thereto, segregated from its own assets in the form of trust funds. The Court of Appeals decided this case as though the $176,000 paid the petitioner (he actually received only $119,000) (660-62) in 1926, had been paid over into the hands of a receiver after suit, as in *Leadville Coal Co.* v. *McCreery,*[20] and *Richmond* v. *Irons,*[21] typical hybrid class suits cited by the court below, where the Court's power over the *res* in fact was absolute and dispositive; and what is more, the $233,000 for interest on the $176,000, part of the judgment awarded (1752), was treated in the same fashion.

4. But even if a hybrid class suit theory applies, the judgment below transcends any precedent and violates, it is submitted, basic due process requirements in that it adjudicates and bars the prosecution of the personal separate rights of the 89 absent claimants (1738, 1767), de-

[19] Each of the cases cited by the court below (R. 1078, 1079) involved specific identifiable or traceable properties. See 3 Scott on *Trusts*, § 462; § 462.3, pp. 2318-19; § 508.2, p. 2438; § 518, p. 2484.

[20] 141 U. S. 475.

[21] 121 U. S. 27.

spite an indisputable lack of jurisdiction *in personam* as to them. A hybrid class action, insofar as it operates in *rem*, is conclusive to all members of the class; insofar as it is *in personam*, it does not bind those who are not parties. 3 Moore, *Federal Practice*, 2d ed. ¶23.11 [4] p. 3468.[22]

But the judgment below goes even further. It in effect transfers the separate and personal claims of the 89 absentees (including the 32 who never received notice) to the 72 claimants who had appeared and prosecuted (1735; 1737; 1752; 1754-67). If this principle were valid, it would mean that if only, let us say, 3 out of the 161 Subscribers had appeared, the Court could award them the judgment for the entire $409,000, though their *pro rata* share of the $176,000 was no more than $10,000. The error is demonstrated by the very excess of the judgment below over the total of the recoveries, had each of the 72 brought an independent suit for his proportionate share of the alleged misappropriation. The class action cannot constitutionally and in justice serve as a means of creating a bonanza for the plaintiffs and a method of inflicting punishment upon the defendant.

Petitioner was thus doubly wronged. First, he was deprived of the implicit relinquishment and abandonment of 89 claims (R. 1078) which should have served to reduce petitioner's liability *pro tanto*;[23] and secondly, it left petitioner in a position of double jeopardy in that, to the extent of the claims of such absent members if not abandoned, he might be required to pay twice. In a suit against petitioner by such absent members, it would be held that barring their several claims without jurisdiction over them *in personam*, was a nullity, particularly since the notice

[22] Likewise in a spurious class action the judgment is not *res adjudicata* as to non-joiners. See cases cited by court below (R. 1077, fn. 3).

[23] If no class action has been brought, such would manifestly have been the result.

to the absent members, of the opportunity to intervene and assert their claims in the District Court, contained no warning that upon failure to do so, their claims would be barred,[24] and that as to some of them, such notice was never delivered (997-8; 1007-11; 1510-18; R. 323-54).

5. In *Mason* v. *Henry*, 152 N. Y. 529, the Court of Appeals of the State of New York held that in an action for fraud, governed by the statute of limitations now embodied in New York Civil Practice Act, §48(5) (*supra*, p. 3), whereunder the action is barred six years after plaintiff's discovery of the fraud, the statute of limitations having been pleaded, the burden is upon the plaintiff of proving that the fraud was not discovered until within six years of the commencement of the action, for, as the Court says, at page 539:

> "If this were not so, the defendant would have to prove a knowledge in the plaintiff which, in most cases, would be impossible. The burden of showing that the running of the statute had been arrested ought to be upon the plaintiff; as was the rule in equity."

Hence, in individual actions by the Subscribers on their respective and several claims, each would have had the burden of establishing when he first discovered the facts. The Court of Appeals below, in direct conflict with this New York law, held* that in class actions, as to members of the class who intervened after institution of the action by the class representatives and an interlocutory judgment in favor of the class generally, this burden of proof shifted to defendant, at least to the extent of rebutting

[24] If the subscribers who received notice had checked the law, they would have found, as presumptively they did, the unanimity of authority in the Second Circuit, that members of the class who failed to intervene in a spurious class suit (and the District Court, by whose direction the notice had been sent, had so described it), are not barred by any determination therein as to their rights *in personam* against the defendant (R. 1077, fn. 3).

* R. 1081.

the presumption that the times of the discovery of the facts by the class representatives were *prima facie* the dates of the discovery by the originally absent members of the class, a task which, in the language of *Mason* v. *Henry*, "in most cases, would be impossible". Such presumption is a creation of the Court of Appeals below. It is totally without precedent and is in direct conflict with such cases in its own circuit, as *Miller* v. *National City Bank*,[25] *Hackner* v. *Guaranty Trust Co.*,[26] and *Ayer* v. *Kemper*,[27] wherein it was held that in class actions for common law fraud and deceit, the burden of proof is upon each member of the class to establish his reliance upon the misrepresentations. The dictum in *York* v. *Guaranty Trust*,[28] cited below (R. 1081) is not to the contrary, for there the action was not one for common-law fraud but for breach of fiduciary duty and the quoted New York statute of limitations was not involved.

Furthermore, a class representative in a hybrid and spurious class suit is not truly a representative; he actually represents no one but himself. 3 Moore, *Federal Practice*, 2d ed., ¶23.07 [1], at p. 3425. In the nature of things he cannot be representative, even *prima facie*, as to the personal factors of deception, reliance, knowledge and discovery of the facts.

Here petitioner had controverted each individual intervening claimant's lack of knowledge and raised the other personal issues, not by affidavit, as the Court of Appeals held should have been done (R. 1081) but by answer (1246-63) as the trial Court directed (972), thereby putting each particular claimant to his proof (1514).

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[25] 166 Fed. 2d 723, 728 "Reliance is a factor personal to each" member of the class on whose behalf a spurious class suit for fraud based on misrepresentation was brought.

[26] 117 Fed. 2d 95, certiorari denied 313 U. S. 559.

[27] 48 Fed. 2d 11, 14, 15, certiorari denied 284 U. S. 639.

[28] 143 Fed. 2d 503, reversed on other grounds, 326 U. S. 99.

6. Petitioner's answer to the claims of the subsequent intervenors demanded a trial by jury of the issues raised thereby[29] (1262-63). Plaintiff served a notice to take the deposition of certain of the subsequent intervenors pursuant to Federal Rule 26 (1282-1350). The demand and notice were vacated (1264-66; 1333-35). These orders were sustained by the Court of Appeals upon two grounds: (1) that petitioner could not, after the interlocutory decree, relitigate his duty to the class as a whole, and that there was then left only the fixing of rights *inter se;* and (2) that a class suit is an equity device (1080). As to "1", plaintiff's answer to the individual claims did not seek to relitigate any of the common questions of law and fact which were before the Court in the trial preceding the interlocutory decree; an examination of the answer shows that it is limited to the issues personal to each particular claimant.* Further, the very order of the trial Court providing for petitioner's answer to such individual claims, after the interlocutory decree (972), recognizes that petitioner could raise such issues and that the subsequent trial in which in fact petitioner vigorously participated (1412), was not to be limited to a disposition of the rights of the claimants *inter se,*[30] but was to include the very issues

[29] The fact that the trial prior to the interlocutory decree was had to the court alone has no bearing. "The form of trial is determined for each issue, not for the action as a single unit." *Sherwood* v. *U. S.* (2d Cir.), 112 Fed. 2d 587, 591, rev. on other grounds, 312 U. S. 584; see, also, *Branknit Mills* v. *Eday Fabric Sales Corp.* (2d Cir.), 124 Fed. 2d 563.

[30] The Court of Appeals cites the phrase used by this court in *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507, at 515, that the trial court had reserved in the interlocutory decree "essentially supervisory jurisdiction over distribution among the class of the recovery awarded", but what was there said related solely to the question before the court as to whether the reservation of jurisdiction by the trial court as to the issues involving the Rinke Agency subscribers affected Petroleum Conversion Corp., the rival claimant in the triangular controversy, and was only antecedent to the almost directly following conclusion "Petroleum no longer has any concern with these questions". Furthermore, this court did not have in the record then before it the order of the trial court for the interposition of answers to the claims of the subsequent interveners and the trial of the issues resulting therefrom (967-975).

* R. 416-21.

arising out of petitioner's answer. Indeed, the Court of Appeals itself acknowledges the possibility of such issues and outlines the mechanics for their disposition (R. 1080-81). The interlocutory judgment could properly adjudicate only the common questions of law and fact, not the issues personal to the absent members of the class.

As to "2", the fact that this was a class action does not make it an equity suit. A class action at law will lie *Independent Shares Corp.* v. *Deckert,* 3 Cir., 108 Fed. 2d 51, reversed on other grounds, 311 U. S. 282. Such a class suit though "coming straight from equity" cannot deprive a defendant of his constitutional right to trial by jury. See *General Ins. Co.* v. *Goldstein,* 45 N. Y. Supp. 2d 570 (not officially reported); *Georgia Power Co.* v. *Hudson,* 4th Cir., 49 Fed. 2d 66, 68, 69; *Farmers Coop. Oil Co.* v. *Socony Vacuum Oil Co.* [D. C. Iowa], 43 Fed. Supp. 735, mod. on other grounds, 133 Fed. 2d 101. And such, too, must be the effect of Federal Rule 38. The trial and preparation for trial by depositions pursuant to Federal Rule 26 should be no different as to each of the several claims of these subsequent intervenors than if they had, as they could have, instituted independent actions.

These important questions affecting the fundamental right of jury trial in a class suit under the Federal rules and the construction of Rules 26 and 38 in relation thereto warrant, it is respectfully submitted, that a writ be here granted in order to effect authoritative disposition thereof.

B

The decision by the Court of Appeals should also be reviewed by reason of the fact that it is in conflict with the decisions of the highest courts of the forum, on the important issue of the statute of limitations. As the trial

Court held, unless this stale claim, asserted more than seventeen years after the event "comes within the purview of the New York Civil Practice Act § 48(5), it is barred by the other sections and subdivisions of the Practice Act relating to limitations of actions" (592). Section 48(5) above quoted at page 3, provides that an action for fraud is barred unless commenced within six years of the discovery thereof. Here, the facts were allegedly discovered just short of six years before suit (28-30).

Under the State decisional law, Section 48(5) does not govern unless actual, common-law fraud, as distinguished from constructive or equitable fraud, is the *sine qua non* of recovery. *Hearn 45th St. Corp.* v. *Jano*, 283 N. Y. 139, 141; *Teich* v. *Lawrence*, 291 N. Y. 245. It is the reality and essence of the action which controls. *Brick* v. *Cohn-Hall-Marx*, 276 N. Y. 259, 263. As the trial Court puts it, "where fraud is only incidental to the action or where some other remedy is equally adequate, then Section 48(5) is not applicable" (593). Stripped to its essentials, Subscribers' claim, as found by the trial Court, is that petitioner and the defendant Lloyd, appropriated $176,000 of the Subscribers' money through the connivance of their fiduciary Rinke (653, 738). Restitution of an unjust enrichment is the essence of the claim and an action for money had and received affords an "equally adequate remedy". *U. S.* v. *Jefferson*, 291 U. S. 386, 403; *Meyer* v. *Hurley Motor Co.*, 273 U. S. 18, 24; *Cohen* v. *City Company of New York*, 283 N. Y. 112, 117; Restatement, *Restitution*, pp. 23, 523.

Thus, Civil Practice Act, § 48(5) does not govern an action to recover secret profits though secured by fraudulent means and in breach of fiduciary duty. *Hastings* v. *H. M. Byllesby*, 293 N. Y. 404, 411; certiorari denied 324 U. S. 860; *Gobel, Inc.* v. *Hammerslough*, 263 A. D. 1, aff'd 288 N. Y. 653; *Wechsler* v. *Bowman*, 285 N. Y. 284, 293-4;

Dunlop's Sons, Inc. v. *Dunlop,* 259 A. D. 233, aff'd 285 N. Y. 333; *Frank* v. *Carlisle,* 261 A. D. 13, aff'd 286 N. Y. 586. It does not apply to an action against a corporate officer to recover funds misappropriated or embezzled by him. *Gottfried* v. *Gottfried,* 269 A. D. 413, 418; *Meyer* v. *Meyer,* 271 A. D. 465, 476; *Cwerdinski* v. *Bent,* 256 A. D. 612, aff'd 281 N. Y. 782. Likewise, in an action against a trustee *ex maleficio,* the statute runs from the time of the wrong and not from its discovery. *Wood* v. *Young,* 141 N. Y. 211; *Mills* v. *Mills,* 115 N. Y. 80; *Lammer* v. *Stoddard,* 103 N. Y. 672; *Hart* v. *Goadby,* 72 Misc. 232 (LEHMAN, *J.*).

An action, complete and sufficient in itself, cannot by the addition of elements of deceit be converted into an action for actual fraud within Section 48(5) so as to avoid the bar of another statute of limitations. *Carr* v. *Thompson,* 87 N. Y. 160; *Gobel, Inc.* v. *Hammerslough, supra; Pollock* v. *Warner Bros.,* 266 A. D. 118; *Guild* v. *Hopkins,* 271 A. D. 234, 244, 245, aff'd 297 N. Y. 477.

In this case the Court of Appeals spelled out an action for fraud on the basis, unsupported by any trial Court finding, or the record,[31] that the Subscribers were induced to subscribe, by statements as to the use to which their subscriptions were to be put, which were false in that they were used for the profit of petitioner (R. 1080-81). But the Court of Appeals had held a few pages before that the gist of the action was a constructive trust (R. 1078).

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[31] The statements in the subscription agreements specifically informed the subscribers that the subscription monies were to be used to buy the plant from the purchaser thereof at the lien foreclosure sale, for the new company (2746-56). The subscribers were each advised that petitioner was such purchaser (2575-77; 478). The petitioner, a non-fiduciary (594) had paid $87,310 plus an undertaking for a like amount of stock of the new company (2289). He had no obligation to resell without a profit and the subscribers could not reasonably expect him to (*infra,* pp. 29-30). The subscribers' agreements did not say otherwise (2746-56). Dickinson would have no responsibility for any misrepresentations in the subscription forms. *Wiser* v. *Lawler,* 189 U. S. 260. In fact, there were no misrepresentations therein, or elsewhere.

C

The affirmance by the Court of Appeals that the Subscribers did not have knowledge of the payments to petitioner flies in the face of decisions both of this Court and of the New York Court of Appeals, since the documentary and uncontroverted evidence shows that the Subscribers were put upon inquiry and were charged with knowledge of the facts in 1926 as a matter of law. The purchase price paid by petitioner at the lien foreclosure sale, was a matter of public record. *Babcock* v. *Tam*, 9 Cir., 156 Fed. 2d 116; *U. S.* v. *Christopher*, 10 Cir., 71 Fed. 2d 764; *Little* v. *Haas*, 68 Fed. Supp. 545 (D. C. Ga.) The Subscribers were expressly informed by recitals in the subscription agreements and by letter, of the lien foreclosure sale and of the purchase of the plant by petitioner (2747; 2752; 249; 478-80; 2575-77) through his own means (479; 2576), and the plan to repurchase it from whoever purchased it at the lien foreclosure sale (2746-49) for the new corporation, through the Agent, with Agency funds (478-80). The Agent, in the subscription agreements, expressly agreed to apply the monies thereunder for the acquisition of said plant or an interest therein (2734-35; 2748; 2754-55), and thereafter, a letter dated July 1, 1926 to all of the Subscribers informed them of the balance due for "liens" to be paid by the Agent (480) in the amount approximately then due petitioner (659-62) pursuant to the agreement to pay him from Agency funds the exact amount of the liens which had been foreclosed (*supra*, pp. 11-13). The subscription agreements did not make any representations in words or in substance, that the foreclosed plant was to be reacquired without payment of any profit to the vendor (R. 912, 916-19). Patently, one, not a fiduciary (594) who had bought in a plant on a sale to satisfy a $174,000 judgment, with the expenditure of one-half that

sum in cash, plus an undertaking to deliver a like amount of stock would not resell and would not be expected to resell, without a profit.

Despite many opportunities for inquiry (2018-20; 2027-28; 2126; 2592), there is neither finding nor proof that any Subscriber was misinformed as to any of the facts. 158 of the 161 Subscribers failed to testify, and the other three merely claimed ignorance (2016-51; 2113-27; 2926).

Certainly, the insiders knew the facts. 18 of the 161 Subscribers who paid almost half of the total subscriptions (2784), men of outstanding business and professional experience (2518-20) were the overwhelming majority of both the Boards of the old and new companies (2281-82; 2709; 2784) and the entire Bondholders Protective Committee which sponsored the reorganization (661-62; 2746-47; 2752-53). The failure of the Court below to hold, under these circumstances, that the Subscribers were at least put upon inquiry or were guilty of such negligent ignorance as to be equivalent to actual knowledge, runs counter to *Hammond* v. *Hopkins*, 143 U. S. 224, 251; *Fidelity & Deposit Co.* v. *Queens County Trust Co.*, 226 N. Y. 225, 233; and *Sielcken-Schwartz* v. *American Factors, Ltd.*, 265 N. Y. 239.

D

The Court of Appeals below, in still another respect, decided an important question of local law in a way probably in conflict with the applicable local decisions. It held that the release to one joint tort-feasor was not available as a defense to the other joint tort-feasors because as to them it was wholly gratuitous (R. 1080).

The common law rule that a release to one joint tort-feasor releases the others has long prevailed in New York.

Barrett v. *Third Avenue Ry. Co.*, 45 N. Y. 628, 635; *Milks* v. *McIver*, 264 N. Y. 267, 269; *McNamara* v. *Eastman Kodak Co.*, 232 N. Y. 18, 23, 25. The logic of the rule is that though joint tort-feasors are severally liable, the tort and its consequences are single and indivisible, and in absence of reservation, there can be but one satisfaction. *Walsh* v. *N. Y. C. & H. R. R. Co.*, 204 N. Y. 58, 62. That the release is gratuitous as to the other joint tort-feasors, is thus irrelevant to the principle involved. Moreover, in New York, by statute, a release in writing is effective though lacking consideration.[32] Debtor and Creditor Law, § 243 (L. 1936, c. 222); Personal Property Law, § 33, subd. 2 (L. 1936, c. 281).

So far as our research reveals, this holding is unprecedented. The authorities cited in the opinion (R. 1080) go no further than to support the general rule that a release requires a consideration; joint tort feasors were not involved and certainly not the question whether a release of a joint tort-feasor releases the others even though as to them the release is gratuitous. A review by this Court seems necessary to preclude the confusion and uncertainty in the local law on this issue which would flow from the precedential effect of this decision.

E

The Court of Appeals held that the misappropriation of the $176,000 damaged the Subscribers, an essential element of their cause of action for fraud and deceit (R. 1081).

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[32] The releases given in 1938 by the subscribers to Rinke expressed a specific consideration (2410). *Lawrence* v. *McCalmont*, 2 How. 426, 452. This was the manner of distribution of the stock to which the subscribers acknowledged they were not entitled (2405; 2412). The subscribers, with admitted knowledge of all the facts since 1938 (29), failed to seek rescission of the release and thus rescission is barred. *McNamara* v. *Eastman Kodak Co.*, 232 N. Y. 18. Even if avoidable, the release remains effective as a release of other joint tort-feasors until rescinded. *Magnolia Petroleum Co.* v. *McFall*, 178 Ark. 596, 12 S. W. 2d 15.

That determination seems probably in conflict with local law and the great weight of authority. The misappropriation, if misappropriation there was, damaged Petroleum and not the Subscribers. The Rinke Agency, after Knox was wiped out, was a capital-raising device (R. 1072) for the benefit of Petroleum. The subscription agreements themselves provided for the expenditure of monies paid thereunder for specified and "other corporate purposes" or payment over by Rinke to Petroleum for its stock (2748-49; 2754-56). The Subscribers accepted receipts for their monies, entitling them only to stock therefor (1521-23). There has never been a rescission by the Subscribers of such subscription agreements or return of such stock received. By the issuance of the $1,200,000 par of stock for the Subscribers, exactly equal to the total $600,000 subscribed at "two for one" (508-9; 669; 675; 681; 1523-24; 2267-68), Petroleum became entitled to the monies paid to Rinke by the Subscribers for such stock and not expended by him in accordance with the subscription agreements. *Stewart* v. *King*, 85 Ore. 14, 166 Pac. 55, 57; *San Joaquin L. & W. Co.* v. *West*, 94 Cal. 399, 29 Pac. 785; *Gulf Coast Western Oil Co.* v. *Trapp*, 165 Fed. 2d 343, 350 (10th Cir.).

Rinke paid over to Petroleum the subscription monies in his hands at the time of its organization (1938-39) as well as such monies thereafter received (1941; 1947-53; 1959; 2398).

Contrary to the position of the District Court (466), no express assignment or transfer to Petroleum of the claim for the alleged misappropriation was needed since Petroleum was the third party beneficiary of such agreements and the real party in interest. *Coleman Hotel Co.* v. *Crawford*, 3 S. W. 2d 1109 (C. A., Texas); *Horseshoe Pier Amusement Co.* v. *Sibley*, 157 Cal. 442, 108 Pac. 308; 4 Fletcher, *Cyc. Corporations*, § 1442, p. 115. There is an

assignment by operation of law. "In reality, it is a matter of succession, not transfer". *American Shipbuilding Co.* v. *Commonwealth S. S. Co.* (6th Cir.), 215 Fed. 296, 299. Thus, a corporation, and not its subscribers, is entitled to recover for pre-incorporation fraud inducing the subscribers to subscribe and the purchase of property for the corporation with their monies. *Arnold* v. *Searing*, 73 N. J. Eq. 262, 67 Atl. 831. Alternatively, it is entitled to rescission for such fraud and the recovery of the subscribers' money paid on account. *American Shipbuilding Co.* v. *Commonwealth S. S. Co., supra* Similarly, it is the corporation which is entitled to recover pre-incorporation secret profits out of stock subscription monies. *Edenborn* v. *Sim* (2d Cir.), 206 Fed. 275; *Koppitz-Melchors, Inc.* v. *Koppitz*, 315 Mich. 582, 24 N. W. 2d 220; *Ex-Mission L. & W. Co.* v. *Flash*, 97 Cal. 610, 32 Pac. 600.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be granted.

ALBERT G. DICKINSON,
Petitioner.

By SOLOMON KAUFMAN,
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No. 345

FILED
OCT 23 1952
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1952

ALBERT G. DICKINSON,

Petitioner,

against

E. LEWIS BURNHAM and JAMES A. VAUGHAN, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Statement of the Case	2
A. History of the Litigation	2
B. The Facts	2
C. The Decisions Below	25
Summary of Argument	26
Argument	27
POINT I—If important or novel questions actually exist in Petitioner's Class Action Argument their determination is not required in solving any controversy between the petitioners and respondents	27
POINT II—Questions now presented—as to (1) applicability of Section 48(5) of the New York Civil Practice Act, (2) petitioner's demand for trial by jury of the issues raised by his answer to the claims of the subsequently intervening members of the class, (3) knowledge by Subscribers of fraudulent payments out of the Rinke Agency funds to petitioner (and Lloyd), (4) the Rinke "release", and (5) Petroleum, not the Subscribers, had the claim for the misappropriated Rinke Agency funds—were raised at the trial, considered and determined by the trial court, on all the facts and the law, in his exhaustive opinions which were unanimously affirmed by the Court of Appeals. Selected facts and construction thereof most favorable to petitioner should not serve as a basis for re-litigation	32
Conclusion	35

Table of Cases Cited

PAGE

Dickinson v. Burnham, 197 F. (2) 973 1

Dickinson v. Petroleum Conversion Corporation, 338 U. S. 507, 94 L. ed. 299 ..... 28, 29

Statutes Cited

F. R. 52(a) 25, 30

11 Fed. Rules Serv. 489; id. 885 1

New York Civil Practice Act, Sec. 48(5) 25, 32

28 U. S. Code Sec. 1254 (1) 1

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Opinions Below

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 1069), filed on June 24, 1952, is reported in 197 F. (2) 973. The opinion of the District Court (R. 35-202) on the merits is in part reported at 11 Fed. Rules Serv. 489; id. 885). The final judgment of the District Court (R. 468-500) is not reported.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

STATEMENT OF THE CASE

Summary Statement

A. History of the Litigation

Pursuant to motion of counsel for Petroleum granted by the District Court on October 25, 1943 Burnham & Vaughan were permitted to intervene herein on condition that other pending actions, set forth in a Stipulation (138, 141)[1] be discontinued. The order permitting intervention of Burnham & Vaughan was entered December 3, 1943 (138-9; 169) and they filed an answer to the complaint, and a counterclaim on January 2, 1944 (170).

B. The Facts

The petitioner "proffers * * * an exculpatorily innocent interpretation of the events, skillfully woven from the documentary and uncontroverted evidence" (R. 1071). Inaccuracies and omissions in petitioner's statement make this statement necessary. The record discloses the facts to be:

> Knox and its successor, Petroleum, were patent-holding companies.

The Knox plant located at Texas City, Texas "was a large scale pilot or test plant for the purpose of developing certain advanced procedures in vapor-phase (oil) cracking * * * it was not a commercial plant" (2983).[2]

Prior to Dickinson's purchase of $20,000 par value Knox bonds in September, 1923 he had been interested in a method for the internal application of heat as applied to sub-

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[1] Figures in parenthesis refer to folio numbers unless preceded by the letter "R" indicating pages of the record.

[2] The first commercial plant built to operate under the Knox-Petroleum patents was completed in 1930 (2988) and in 1937 Petroleum received $200,000 as a paid-up royalty on this plant alone (3065).

stances other than oil (2952). Due to the alleged similarity between that method and the method employed under the Knox patents he took a "flyer" and bought the Knox bonds in order "to be in * * * one of the big developments in the oil industry" (2084-85).

Late in 1924 Dickinson met Lloyd, President of Knox, in New York, where he told him "the condition the company was in, that it was bankrupt * * * and was in debt for construction work" (2089) and fully disclosed the Knox records to Dickinson (2860-63). Dickinson thereafter went with Lloyd to Texas City, Texas, where they met the attorney representing creditors holding approximately $168,000 liens filed against the Knox pilot plant and 50 adjoining acres (18, 2091-93). He testified that he did not on that visit, or prior to his purchase of the Knox plant upon lien foreclosure on December 21, 1925, have any correspondence or personal conversations with the lienors (3003); that he did not "at that time * * * bind "himself to the lienors or their attorney" (2098); that he "didn't make a firm commitment to take up the liens at that time;" that he "didn't put up any money * * * at that time"; that he "hadn't guaranteed any obligation of any kind"; that he "never agreed with anyone to take up the liens"; that he had not used his credit in any way or legally obligated himself in connection with Knox (3054-57; 303N); that he "wasn't in a position to furnish money to the company for men who were ten to twelve times more able than (he) was to take care (of the liens)" (3056).

Contemplating aid from Dickinson in connection with a plan for the refinancing of the liens the Knox Board on November 13, 1924 authorized Lloyd to make any contract he deemed advisable with Dickinson. Nothing was accomplished under this proposal (642).

Dickinson, one of the largest owners of Knox bonds, made thorough investigation of the condition and status

of Knox late in 1924 and early in 1925, including conferences with Lloyd in New York City and Grand Rapids, Michigan (2089-90); a visit with Lloyd to Texas City, Texas and interview with the attorney representing the lienors (18, 2091-93); interview with Knox Advisory Board in New York while Lloyd was in Europe and later met the full Board with Lloyd (2447); personal investigation, with his attorney and accountant, of Knox records (2860-63) and to the knowledge of Rinke "spent days" with Lloyd (2478, p. 3 of Ex. 45-B).

What Dickinson and Lloyd saw in the overall Knox situation, as clearly revealed by their own records, was:

1) That responsible men of standing (2518-20; 2199-2214), whom Dickinson recognized as early as December, 1924 "were ten to twelve times more able than I (Dickinson) to take care of (the liens)" (3056), had already made a large cash investment in Knox bonds and it was self-evident to Dickinson and Lloyd (2452), and also to Rinke (2478, p. 3 of Ex. 45-B), that these men would have to protect the equity of their investment (2486; 3124);

2) That for this reason, as Lloyd advised Dickinson in writing as early as January 7, 1925 and prior to creation of the Rinke Agency on February 26, 1925, there would be no enforced lien foreclosure sale—"the bondholders have a million dollar investment to protect" (2486);

3) That through a partnership arrangement with Lloyd, Dickinson would be in a position to develop and extend his claims of use of his Convector apparatus in the oil refining industry (2085), to which end Dickinson's son, an engineer, early in 1925 became, and continued as, a Knox employee "past the middle of 1928" (708-9; 3006) located at Texas City (2957-58) as Dickinson's representative "re-

porting constantly, daily writing of what progress was being made" (708; 3005)—"He was there for that purpose" (3011);

4) That "in getting control of this property" (Knox plant) there was "not only security but * * * the gamble of great profit is really tremendous" (3121-25). Dickinson agreed "perfectly * * * provided the work of the drive on the bondholders is continued to success," and proposed the purchase of the liens "on the basis of fifty cents on the dollar (to) be paid for by the Company at face value with interest" (309-10).

Thus fortified, Dickinson negotiated a "partnership" agreement with Lloyd, knowing that Lloyd was a director and the principal executive officer of Knox (3034-35). On January 6, 1925 Lloyd "thought (he) had very clearly explained to (Dickinson) when (they) talked in Grand Rapids" what their arrangement was (2455, 2456, 2470), but on February 20, 1925 Dickinson requested written confirmation specifying what he was to receive, including "one-half of the amount of stock which is to be derived from the protection of the liens" (20,600 shares) (2511-12). And on March 2, 1925 they entered into an agreement in writing (2374-82) the main purpose of which was to provide for a division of their profits (648).

Immediately following Dickinson's request, the Knox Board met on February 26, 1925 (Lloyd attending) and passed resolutions[3] which in form provided for two methods to solve the Knox lien problem. By the first method the Knox Board again contemplated the aid of Dickinson

[3] (2492-2505) erroneously purports to be the Minutes of a Special Meeting of Knox Board held on February 26, 1925. That part of the minutes of such meeting which are there omitted are supplied at 3082-88).

(2492-2505); by the second method Rinke was to acquire the liens with funds subscribed through Arthur W. Rinke, Agent (the "Rinke Agency") (3082-88).

The intent and purpose of the Knox Board in passing this resolution was to provide one method for solving the lien problem whereby Dickinson would buy in all or part of the liens for cash. "All advances or investments made by Dickinson in or in connection with said liens (were to) be liquidated by the company solely by the issuance of stock at par therefor, upon surrender of the liens to the company" (645; 2502). Dickinson was to be reimbursed in stock, not in cash (287-88, 294, 429), a fact which he shortly thereafter complained about (317, 318).

The 20,600 shares were a gift to Dickinson (643; 307). Prior to the Knox Board meeting and on February 7, 1925, Lloyd in letter to Dickinson referred to this block as a "bonus of stock" (304, 2489). Rinke, who prepared the Dickinson-Lloyd agreement of March 2, 1925, in letter to Dickinson dated February 27, 1925 likewise referred to such shares as "a bonus"—but a bonus in which Lloyd was to have a one-half interest (2775; 307). Lloyd had not used the credit standing of Dickinson for the benefit of the company and Dickinson had not rendered valuable services to Knox in connection with the liens, the alleged reasons for the gift as recited in the preamble to said resolutions (643-44; 2867-70).

Thus five days prior to the Knox Board meeting on February 26, 1925 and on February 20, 1925 (2511, 2512), Dickinson had requested a written agreement with Lloyd dividing such shares 50-50 between them and five days after such board meeting, on March 2, 1925 (2377), the Dickinson-Lloyd profit-dividing agreement was executed. Writing Dickinson on February 27, 1925 the details of his preparation of the Dickinson-Lloyd profit-sharing agreement of March 2, 1925, Rinke stated he would "recite in the instrument" the use of Dickinson's "credit in connection with

he liens as the consideration for the (Knox) deal" (2773-9).

1. The method by which the Knox Board contemplated he aid of Dickinson was mere scheme-scenery so far as Dickinson and Lloyd were concerned. Both knew that Dickinson would not make any money advance thereunder. Lloyd repeatedly so assured Dickinson from time to time 308-9; 2467-68) and finally on February 17, 1925, upon orwarding a copy of subscription agreements, Lloyd again ssured Dickinson that "when there are sufficient subcriptions in hand to warrant the establishment of credit o permit raising of additional funds when necessary, I vill suggest to you then making the advances *under our greement*" (305-6) (emphasis supplied). Furthermore Dickinson knew that it was "no new thought of (Lloyd's) hat a reorganization (of Knox) was inevitably necessary (and) the longer the lienors delay foreclosure proceedings, he more the interest secondary to these liens will provide o keep the wheels moving"—Lloyd suggesting "the purchase of an interest in some of these liens, * * * (to be) able to dictate the policy of reorganization" (3117-20).

Their own plan whereby Dickinson was to purchase the liens at less than face value—"our present plan" (discussed infra)—then being in progress, Dickinson on April 18, 1925 agreed with Lloyd "perfectly * * * in moving to get control of the liens at this time, that is, provided the work of the drive on the bondholders is continued to success. These liens should be secured in such a manner so that they can be paid for by the Company at face value with interest. My suggestion is that they should be obtained by us on the basis of fifty cents on the dollar. * * *" (309-10).

Lloyd was fearful, and so advised Dickinson, that the Rinke Agency Subscribers would "provide much more than necessary to take up the liens on the 50-50 basis, but if this were done, there would be no use for you (Dickinson) and me (Lloyd)" (329).

Five months after "accepting" the Knox resolution Dickinson, having agreed to divide the "bonus stock" with Lloyd and disregarding his understanding with Knox, decided he wanted cash, not stock. Writing Lloyd on July 21, 1925, he found "the resolution of (February 26, 1925) enclosed inconsistent with *our present plan,*" that is, Dickinson's proposed plan to purchase the liens at "50¢ on the dollar," but expecting to be reimbursed by the company in cash at the face value of the liens (317-19). By letter dated July 27, 1925 Rinke (not Lloyd) "endeavor(ed) to answer the third paragraph" of Dickinson's letter to Lloyd. That paragraph relates exclusively to the Dickinson-Lloyd "present plan" whereby they contemplated the purchase of the liens at 50¢ on the dollar (320, 322; 2758-63).[4]

By letter and by his testimony Rinke refuted Dickinson's assertion of an agreement, suggestion or proposal between him and Rinke whereby, if Dickinson had acquired the liens at 50¢ on the dollar of their face value, that he, Rinke, agreed to pay Dickinson the full face value of such liens (320, 321; 326-27; 2870-71; 2872; 2832-35; 2826).

2. The second method for solving the Knox plant lien problem was also provided at said Knox Board Meeting on February 26, 1925 (3082-88). It was on this method that Dickinson and Lloyd, with the connivance of Rinke, wholly relied to mulct the Subscribers.

The purpose of the Rinke Agency was to provide *funds* with which to acquire the liens (630-31). Under five Agency Agreements, $597,542.50 was paid to Rinke, Agent, in cash by over 100 subscribers (630-32, 639).

A sufficient number of shares to liquidate all of the liens was reserved by Knox (3087). The intent of the resolu-

[4] This proposed scheme, "our present plan", to purchase the *liens* was in fact discarded but the same scheme was employed five months later in the Lloyd bid for the *property* (Knox plant) (2290-96).

tions was to give the subscribers par value in stock for face value of any liens that were acquired by Rinke, Agent (647).

The principal subscribers were the Knox bondholders who had previously invested some $860,000 in Knox bonds. They were being asked to protect their investments by subscribing to the Rinke Agency Fund (330-31).

Lloyd formulated the plans to raise money through the Rinke Agency and then discussed them with others of his own choice (2940-41; cf. 316-17). To meet the progressively changing schemes of Dickinson and Lloyd the five agreements were required, their respective provisions and representations varying from time to time to meet such schemes.

Under the *First Agency Agreement* (2723-27) $104,150.00 was subscribed and paid to Rinke during the period January 2, 1925 to August 8, 1925, $27,500.00 of which was paid to Knox directly by the Subscribers (635). Rinke was authorized to invest the money received in Knox stock, or in liens, but Rinke failed to do either (2822-23).

Under the *Second Agency Agreement* (2728-33) $127,260.00 was subscribed and paid to Rinke Agent, during the period May 29, 1925 to December 23, 1926 (635).

By an agreement between Knox and Rinke dated June 2, 1925, Rinke agreed to advance funds to Knox and protect it so far as possible in connection with the liens filed against its plant. For such advances and for all liens acquired and delivered by Rinke, Knox agreed *inter alia* to deliver its stock (639-42; 312-16).

Significantly this Second Agency Agreement was put into use when Dickinson and Lloyd were scheming to put into effect "our present plan," whereby Lloyd suggested that Dickinson acquire some of the liens at less than their face value and Dickinson countered with "50¢ on the

dollar'' in cash—18,000 of the 20,600 shares of Knox stock received by Dickinson as ''bonus stock'' being included later as a part of such plan (3119-20; 3122-23; 311; 309-10; 329; 318-19; 325-27).

The Second Agency Agreement recites that Rinke had a license whereby he could operate under the Knox patents ''in the event of his foreclosing any lien,'' and Rinke agreed under paragraph FOURTH thereof ''to apply forty (40%) per cent of the money received * * * for the acquisition of liens * * * *or so much thereof as may be required for that purpose* * * * '' (2728-29; 2731) (emphasis supplied). As explained by Rinke to Dickinson the 40% reserve provision would secure Dickinson against any advance he might make to purchase the liens for Knox since 40% ''of the contemplated $500,000 of subscriptions will make available * * * an amount adequate to reimburse you (Dickinson) as the new owner of the liens for all cash advanced'' by Dickinson (320-21). But the overriding scheme whereby Dickinson would purchase the Knox plant *property* ''at 50¢ on the dollar,'' *in lieu of the liens*, was meantime developed with such acceleration that an undated alleged amendment to paragraph FOURTH was added to a few of the Second Agency Agreement forms after July 27, 1925 authorizing Rinke, in the alternative, to apply the money received by him ''in purchasing the Texas *property* * * * by whomsoever the said property may have been or may hereafter be acquired * * * '' (2734). Removal of the 40% restriction by the alleged amendment would enable Rinke in his discretion to make available larger amounts for Dickinson under ''our present plan,'' had Dickinson purchased the liens, and also under the overriding scheme should Dickinson purchase the Knox plant property upon foreclosure of the liens. The formula and basis for both schemes was the same, i.e., ''Thru the proposed Lloyd deed of trust and pay for them (the liens or the property) one-half in cash and one-half in stock,'' the stock being avail-

able out of the 20,600 shares bonus stock "thru the resolution" and "the cash would be advanced by you (Dickinson) until * * * you (Dickinson) would turn the liens (or property) over to me as Agent and I, as Agent, would pay you (Dickinson) the cash that you had disbursed" (325-27; 2290-97; 655-56). On December 5, 1925 Lloyd explained to Dickinson that it was to avoid any "chance of anyone antagonistic to our efforts being able to show collusion" that their plan to acquire the liens was discontinued (339). Thus when the Dickinson-Lloyd schemes changed the Agency Agreement forms were correspondingly altered.

Rinke's statement to Dickinson on July 27, 1925 that "the directors, and also the substantial Subscribers * * * all thoroughly comprehend that someone is to buy up the liens and then sell them to me as Agent at face amount" (320) was patently false and directly contrary to his specific agreement "to apply forty (40%) per cent of the money received * * * hereunder for the acquisition of liens * * * or so much thereof as may be required for that purpose" (2731-33).

Caution was exercised in connection with the release of the Second Subscription Agreement. A notice of its method of financing the Company was to be sent to all security holders but the form thereof was to be "determined by (Lloyd)" (316-17).

The *Third Agency Agreement* (2737-45) was put into use November 11, 1925 and discontinued January 18, 1926 (632). $800.00 was received by Rinke, Agent, from Subscribers under this Agreement and transferred to the Fourth Agency Agreement, on Rinke's accounts (638).

The Third Agency Agreement, the first to recite that $600,000 was the Rinke Agency goal, provided that the first application of money received thereunder was: "1. For the acquisition of *liens* in whole or in part, now or hereafter filed against the plant of Knox Process Corporation at

Texas City" (2739, 2742) (emphasis supplied). Since Dickinson had acquired *title* to the Knox *plant* on December 21, 1925, in lieu of the liens, such representation was false and the use of the Third Agreement form was promptly terminated.

Meantime, immediately after the Knox plant was purchased by Dickinson, Lloyd wrote Dickinson on December 30, 1925 advising of "the exact condition of affairs" with Rinke Agency and that there was "available collectible funds" of $109,039.60, or "approximately $30,000 more than it would take to see you (Dickinson) and me (Lloyd) on the cash profit side of this transaction" (3109-11). No attempt was made to use these Agency funds to purchase the Knox plant or the liens thereon at the cash discount to the advantage of the Subscribers who had no knowledge of the Dickinson-Lloyd scheme (2914-15).

The *Fourth Agency Agreement* (2746-51) was put into use January 21, 1926 (632), one month after Dickinson had acquired title to the Knox plant on December 21, 1925 (656-57) and the same day on which he "advanced" the cash balance of $82,310.28 of his bid (657-58; 348; 454-55).

Under the Fourth Agency Agreement $169,625.00 (including the $800.00 transferred from the Third Agency Agreement) was subscribed and paid to Rinke, Agent, during the period from January 26, 1926 to December 27, 1926.

Prior to the inception of the Fourth Agency Agreement the representations of each agreement were directed to "the acquisition of the liens." With the advent of Dickinson as owner of title to the Knox plant, new and different representations to the Subscribers—not to disclose but to conceal—were formulated. For the first time Rinke, as Agent for the Subscribers, was identified in an Agency Agreement form with the Bondholders' Protective Committee. The Fourth Agreement announced Rinke's ap-

pointment as "Agent" also for the Bondholders' Committee, the sale (but not to whom) under foreclosure of liens of most of the physical assets of Knox, the "right" of that committee to acquire property formerly of Knox and to organize or co-operate in the organization of a new corporation and to sell and convey property to such new corporation (2746-48), thus inducing the belief that the rights and interests of the Subscribers and the rights and interests of the Bondholders' Committee had already become, or were about to be, merged for the common benefit. And to keep apace with the execution of the scheme Rinke of course "agreed" under this Fourth Agreement to apply the Subscribers' money received by him for the acquisition of property formerly of Knox or an interest therein (2748). But no part of the moneys subscribed to the Rinke Agency Fund was used by Rinke to purchase the plant and real estate (50 acres) at Texas City, against which the mechanics' liens had been filed (667). Nevertheless the fiction of the "liens" was continued for purposes of deception (368-69) by Rinke (478-83), and by Dickinson as late as January and February, 1937 in his protestations of innocence (421-28) and assertion that he "furnish(ed) the necessary money to take care of the liens" (422; 2782).

As of the effective date of the Fourth Agreement, Dickinson had "advanced" $87,310.28 cash, or one-half the total liens of $174,620.56, and had been repaid $5,000 from the Agency funds as the balance of a "loan" of $10,000 (ostensibly made as the full or part down payment with Lloyd's bid) (653-54; 657, 348).

Six months prior to the inception of the Fourth Agency Agreement Rinke, in letter to Dickinson dated July 27, 1925, set forth the Dickinson-Lloyd scheme originally devised in connection with the proposed purchase of the liens (327) but in fact subsequently employed in the purchase of the Knox plant property (2290-96), and advised

Dickinson that with respect to any cash "advanced" by Dickinson he, Rinke, would repay Dickinson (327).

Significantly the Fourth Agency Agreement is silent with respect to the purchase of the Knox plant by Dickinson although the date of its inception and the date of such purchase were approximately simultaneous. Dickinson had "advanced" $87,310.28 on January 21, 1926 and held title to the property. On January 30, 1926 Dickinson requested Lloyd "in the next 'conference' to go into the reorganization plans and plans for control." Dickinson trusted that Lloyd was "holding to the determination to see that the bondholders furnish all the money for the payment of the property * * * before operations start" (357), and in repayment of his "advance" he was "not particular where (the money) comes from" insisting "it should be forthcoming at once" (3107). Lloyd was sure that Dickinson agreed with him "that we ought to have the other fellows' money and none of our own in it" (367).

On June 29, 1926 Lloyd advised Dickinson that he was calling a meeting of the Directors to face "the issue to complete the $600,000 subscription * * * the full 100% in money has got to be paid to us covering the total amount of the liens * * * there is only one way that I have in mind and that is for you and me to get ours and that we are going to do" (485-86).

Two days after Lloyd's letter to Dickinson and on July 1, 1926 Rinke, the fiduciary, aiding Dickinson and Lloyd to attain their fraudulent ends, addressed a letter to the Subscribers (478-80, N5). In the light of the subsequently discovered facts it is the epitome of double talk, replete with false and deceiving statements, significantly concealing and misleading (481-88). It served its sole intended purpose—the solicitation of additional funds from the Subscribers from whom the truth was withheld. It did not inform the Subscribers of any facts which would apprise them of the frauds (738).

Under the *Fifth Agency Agreement* (2752-57) $186,082.56 was subscribed and paid to Rinke as Agent, during the period from July 26, 1926 to December 20, 1926. Subsequent to December, 1926, Rinke received $10,425.00 on subscriptions which he did not assign to any particular agreement but listed under the heading, "Free Subscriptions" (638, 639).

With a letter dated July 14, 1926, Rinke, as Agent of the Bondholders' Committee, transmitted to the bondholders the form of the fifth subscription (2595). Again significantly neither the letter nor the subscription form disclosed Dickinson's purchase of the Knox plant on December 21, 1925 (2752, 2757).

The form of the Fifth Agency Agreement announced the sale (but not to whom) of the Knox physical assets; the "organization" of Petroleum;[5] that $410,000 had been raised; the desirability and necessity that $190,000 additional be raised to complete the $600,000 goal, and that upon completion thereof Rinke was authorized to accept two shares of Petroleum stock for each $5.00 paid by Subscribers, past and present, in order that the Subscribers should participate on a parity with the bondholders.

Pursuing his custom to keep Dickinson informed from time to time "regarding money with the agent (Rinke)" Lloyd on August 16, 1926 wrote Dickinson giving a list of "unsigned subscriptions." This list included "Dickinson * * * $25,000" (3135). Although Dickinson testified to the contrary (3044-45), nevertheless he did publicly at a dinner meeting of Knox bondholders and Subscribers make such subscription but never paid any part of it (389; 2614; 2061; 372-73).

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[5] Petroleum was incorporated March 25, 1926, but its organization meetings were not held until December 14 and 15, 1926 (668; 2218; 2278) immediately following the final cash "profit" payment to Dickinson and Lloyd on December 10, 1926 (659-62).

A restriction in the Fifth Agency Agreement forbade use of funds until the goal of $600,000 subscriptions had been reached (2754-55). To enable him to obtain "a balance of $25,310.28 and interest on the whole amount" of $87,310.28 at once, Dickinson authorized Lloyd "to subscribe for the Eighty-seven Thousand Dollars, or the balance of the lien money * * * the subscription to be replaced by cash subscriptions as procured" (2633-34).

Dickinson was fully informed from time to time as to the Rinke Agency financial conditions. As of August 20, 1926 he knew that "more than four hundred thousand dollars have been in hand" (361). Dickinson was no less sure than Lloyd of their cash "profit." In advance of its collection they planned its use (361-2).

On September 7, 1926 there was paid to Dickinson from the Rinke Agency funds, by direction of Lloyd (659; 3136-37), the balance of the $87,310.28 "advanced" by Dickinson for the Knox plant, together with interest at 6% thereon (659-60; 45-46; 366-67). Dickinson was thus made whole (367). Dickinson had escaped from his fear of "holding the bag" (367) since he received one-half of Rinke's payments to Lloyd of $15,000 on September 14, 1926; $15,000 on September 28, 1926; $30,000 on October 11, 1926, and on December 10, 1926 Rinke paid Lloyd $27,310.28. By agreement between Dickinson and Lloyd this $27,310.28 was used in market operations in Petroleum stock (660-61; 2614).

Thus in the private arrangement of Dickinson and Lloyd to reorganize Knox for their own personal gains (648-49) Dickinson's and Lloyd's own records disclose that during the lien problem period, after Dickinson's advent, Dickinson and Lloyd operated under three distinct schemes which for their secret purposes required changes from time to time in the Rinke Agency subscription agreement forms and brought about the several Rinke Agency agreements, viz.:

1. An initial common understanding between them, prior and subsequent to February 26, 1925, that no money advance would be made by Dickinson as contemplated by the Knox Board in resolutions passed at meeting on that date as affecting Dickinson (2492-2504; 305-6; 3115-16; 308-9; 3117-20). Nevertheless Dickinson was voted "a bonus of stock" of 20,600 shares, as forecaster Lloyd advised Dickinson on February 7, 1925 (2489).

2. Disregarding the Knox resolutions of February 26, 1925 contemplating the aid of Dickinson, and at least as early as April, 1925, Dickinson and Lloyd schemed to purchase the *liens*, Lloyd suggesting the purchase of an interest in some of the liens in order "to dictate the policy of reorganization" (3117-20). He was sure the liens could be bought for "less than 100% on the dollar" (3121-24) and whatever they could be bought for less than their face value would be "cold profit" (311). Dickinson agreed perfectly "provided * * * the drive on the bondholders is continued to success" and the liens "be paid for by the Company at face value with interest (and) they should be obtained by us on the basis of fifty cents on the dollar" (309-10). Lloyd was sure that on the "fifty cents on the dollar" basis the liens would be bought by the bondholders-subscribers and "there would be no use for you (Dickinson) and me (Lloyd)" (329), but the Subscribers never had such an opportunity.

Discarding the scheme to purchase the *liens* late in 1925 Dickinson and Lloyd conspired to acquire title to the *property* (Knox plant) in the name of Dickinson by purchasing same at lien foreclosure sale at the cash price of "fifty cents on the dollar" of the face amount of the liens, or $87,310.28, plus 18,000 shares of Knox stock, and thereafter to pay

to themselves in cash from Rinke Agency funds through the connivance of Rinke, $174,620.56, the full face amount of the liens, such payments to be falsely designated as payments on account of "advances" for liens and property (651; 3097-4000; 454-55; 594-96).

"In this manner," Lloyd advised Dickinson on December 5, 1925, "we will get the title properly cleared and there can be no possible chance of anyone antagonistic to our efforts being able *to show collusion*" (339) (emphasis supplied).

Thus Dickinson's and Lloyd's own records reveal that the Rinke Agency Agreement forms were moulded to fit the Dickinson-Lloyd schemes to mulct secret cash profits from the Subscribers and that the varying representations therein respectively were made concurrently from time to time wholly to screen the aforesaid three distinct schemes perpetrated by Dickinson and Lloyd in their overall objective "to get ours."

No accounting for the $597,542.50 subscribed and paid to Rinke, Agent, was ever made by Rinke to the Subscribers (633; 639; 2820-22).

Rinke did not use any of the Rinke Agency funds to acquire or liquidate the liens on the Knox plant. In disbursing the funds of the Rinke Agency, Rinke was completely dominated and controlled by Lloyd (633).

Rinke did not produce at the trial records to support his disbursements but described and estimated most of them except some $70,000 for which he could not give any explanation (1394-95).

At least as early as April, 1925 Dickinson and Lloyd were scheming to reorganize Knox for their personal "profit" and "control" (3117-25; 307-10).

On April 15, 1925 Lloyd wrote Dickinson that he was "perfectly satisfied that less than 100% on the dollar any time would settle any of these claims, if the creditors were properly educated as to their position" (3121-22). An employee of Knox, one Steenman, had been active among the lien creditors under direction of Lloyd, with the knowledge of Dickinson, prior to the lien foreclosure sale (2088; 2447; 2484; 3003-04).

Dickinson was fully informed of the lien foreclosure proceedings prior to his bid being made for the Knox plant (2780-83).

On December 5, 1925 Lloyd fully advised Dickinson of his proposed bid, whereby " • • • we will get the title properly cleared and there can be no possible chance of anyone antagonistic to our efforts being able to show collusion" (337-39). By Dickinson's authorization dated December 8, 1925 (2780-83) Lloyd on behalf of Dickinson submitted a bid of $87,310.28 cash plus 18,000 shares of Dickinson's "bonus" of 20,600 shares Knox stock allegedly trusteed to Lloyd and tendered a check of $5,000 "advanced" by Dickinson (2563-64), as down payment and a "Declaration of Trust" reciting, *inter alia,* that he had received from Dickinson and held in trust for the lien-holders said 18,000 shares of Knox stock represented by certificates numbered 10 to 33 inclusive (2291-94; 2298-99). The Knox stock certificate book discloses that no such certificates were ever issued (2836-38). Lloyd's bid, the only one made for the Knox plant, was accepted December 21, 1925.

The balance of $82,310.28 of the cash bid price was paid by Dickinson to the Special Commissioner on January 21, 1926 and Dickinson received a deed dated January 2, 1926. This deed, fully setting forth the consideration, was not recorded until a year later, on January 7, 1927 (658) following the organization meetings of Petroleum.

At least as early as October 4, 1926 and prior to Lloyd's bid "the general scheme" of reorganization was presented to Dickinson in writing (370-76), including the Petroleum set-up (372).

Between January 25, 1926 and September 7, 1926 Rinke paid Dickinson from the Agency funds the sum of $87,310.28 in installments on various dates (659) plus interest of $1,624.28 thereon. Dickinson continued to hold title to the Knox plant until the organization of Petroleum on December 14-15, 1926 (660). In addition, Rinke paid Dickinson and Lloyd from Agency funds an additional $87,310.28 cash "profit" herein discussed at p. 16. For that money neither Dickinson nor Lloyd transferred or assigned anything of value to the Subscribers, or to Rinke as their trustee (652-53, 492). It was a fraudulent scheme by which Dickinson obtained $87,310.28 plus interest, and Dickinson and Lloyd divided between them an additional $87,310.28 of the funds of the Subscribers for whom Rinke was a trustee.

On February 13, 1926 Rinke, as Agent for the Bondholders' Committee, at foreclosure sales, bought the Knox patents for $25,000 and on August 5, 1926 bought the remaining 91 acres of Knox land at Texas City for $10,000 (664-65), with funds subscribed to the Rinke Agency (678). Of this sale Dickinson "had a notice from Loeffler * * * the Commissioner" (2136).

Assertions by petitioner that his bid was made on the assumption that Knox was to continue are wholly without support. The record is to the contrary (3117-25; 337-39). Surely there is no indication of dissatisfaction in Dickinson's letter to Lloyd on January 30, 1926 (3127-29). Dickinson testified that he had a conference at Attorney Gifford's office in New York between January 7 and 21, 1926 "with Mr. Lloyd, Mr. Gifford, and *Mr. Rinke*" but that there was no discussion at that conference with reference

to a new corporation to take over the property formerly of Knox (2135) (emphasis supplied). Yet attorney Gifford's diary discloses that on January 12, 1926 he "had conference with Mr. Lloyd, Mr. Dickinson and *Mr. Sanderson* (Dickinson's son-in-law) with reference to steps to be taken in *reorganization of company*" (2215-16) (emphasis supplied). Dickinson also testified that he thought he was buying the liens and not the property (336). Yet he was fully advised by Lloyd on December 5, 1925 of the terms of the proposed bid for the Knox plant upon foreclosure of liens stating, *inter alia*, "In this manner, of course, we will get the *title* properly cleared * * *" (337-39) (emphasis supplied). And on December 4, 1926 Lloyd reminded Dickinson that "you and I are in line to make considerable value out of a stock which we are about to establish a value for. We have been doing this for over two years" (387).

Thus with the cash "profit" in sight they were ready to and did proceed with the next step in their fraudulent schemes (668), viz., the organization of Petroleum.

Petroleum, "a replica of Knox in financial structure" (270), was incorporated under the laws of Delaware on March 25, 1926 with an authorized capital stock of 1,200,000 shares, par value of $5.00 each (668). The first meeting of the Board of Directors was held on December 14, 1926 and an adjourned meeting on December 15, 1926, by three dummy directors (682; 2218).

The organization of Petroleum conformed to the scheme outlined by Lloyd to Dickinson on October 4, 1926 (370-76). Lloyd was sure the scheme would satisfy Dickinson (375). It did (376-77). Prior to December 4, 1926 Dickinson read the organization documents before they were presented to the Bondholders' Committee and the directors of Knox (2700).

On December 7, 1926, by an exchange of letters, Lloyd on behalf of Petroleum agreed to the sale by Rinke to Petroleum of 91 acres at Texas City and certain patents, formerly of Knox, in exchange for 590,400 shares of Petroleum stock—240,000 shares to be issued to Rinke as Agent for the Subscribers and 350,400 shares to be issued as Agent for Knox Bondholders' Protective Committee. With respect to these shares Lloyd imposed, and Rinke without authorization accepted, "restrictions" against sale (2241-42). Rinke accepted the offer by letter dated December 7, 1926 (668-69; 2246-51) and assigned, transferred and conveyed such property to Petroleum.

Similarly on December 7, 1926 Lloyd on behalf of Petroleum offered to purchase the Knox plant from Dickinson in consideration of 609,600 shares of Petroleum stock, 469,600 of which he agreed to have issued in Dickinson's name or his designee (they were actually issued in Lloyd's name and without "restrictions" against sale), 140,000 of which were issued in Lloyd's name and by him transferred and delivered to Petroleum as treasury stock (669-71; 2252-56).

The offers and acceptances submitted by Lloyd to the Petroleum dummy Board of Directors on December 14, 1926 were part of the fraudulent scheme to obtain for Dickinson from Petroleum an amount of stock in excess of that provided under the resolution of Knox directors on February 26, 1925 (674), which was 79,928 shares (or twice 34,964 at 2 for 1) (489-90).

Shares so issued to Rinke were computed on the basis of 400 shares for each $1,000 par value of Knox bonds deposited with the Committee and of 400 shares for each $1,000 subscribed and paid in, respectively (681). The stock provided to be issued to Dickinson, a bondholder and nonpaying public subscriber to the Rinke Agency, was computed on the same basis (2148).

Prior to the organization of Petroleum and on October 4, 1926, Lloyd had advised Dickinson that he would hold the stock issued to Rinke, Agent, after its issuance (372). And he did! This stock was delivered ten years later in 1937 by direction of Petroleum's Board after the disappearance of Lloyd in October, 1936 while under investigation (732-34).

Despite Dickinson's testimony to the contrary (2138-39), prior to the organization of Petroleum on December 14-15, 1926, plans in "the general scheme" were actively under consideration by Dickinson and Lloyd. On December 22, 1925, the day on which Lloyd was notified of acceptance of his bid on behalf of Dickinson to purchase the Knox plant, Lloyd advised Dickinson in writing of the "general plan" (341, 343-47); according to his diary Attorney Gifford, on January 12, 1926, "had conference with Mr. Lloyd, Mr. Dickinson and Mr. Sanderson with reference to steps to be taken in reorganization of (Knox)" (2215-16); on January 20, 1926, Dickinson requested Lloyd "in the next 'conference' * * * to go into the reorganization plans and plans for control" (3127-29); on February 10, 1926 Lloyd felt that Dickinson had "the organization plans * * * very clearly in mind" and proposed "the organization of PETROLEUM CONVERSION CORP'N" (3130-33), and by October 4, 1926, when the "second $87,000" was in sight and "the general scheme" became definite, Lloyd wrote Dickinson in detail as to the reorganization procedure, adding assurance that he would "see to it" that their Petroleum stock would be sold to the public "when it is quoted on the curb" (370-76). Immediately expressing his approval, Dickinson on October 7, 1926, wrote Lloyd: "I take my hat off to you for the manner in which you are framing this to our advantage * * * " (376-77).

The Dickinson block of 469,600 shares, being without sale restrictions, was so-called "free stock" or "loose stock" (390-91). Three months prior to the organization

of Petroleum Dickinson and Lloyd planned to use their share of this block and part of the cash from the "second $87,000.00" Rinke agency payment in Petroleum stock market operations (3137-38). From "the very first day" it was sold simultaneously with the 140,000 shares of Petroleum so-called treasury stock (3070-72). Lloyd figured that "this will leave for you (Dickinson) and for me on the deal alone anywhere from $600,000 to $700,000 par" (374) and Dickinson's hat was off to him (377).

On December 8, 1926 Lloyd received from Rinke the balance of the "second $87,000," of $27,310.28, "in lieu of subscription of $25,000 which we made at the dinner" (389). On the same day Rinke advised Dickinson that he was sending to Lloyd $27,310.28 in connection with "the release of liens" (390). Dickinson agreed to its use in market operations in Petroleum stock (662; 377; 386-87).

Out of the "free stock" Lloyd set aside 244,041 shares for the stockholders of U. S. Gasoline Manufacturing Corporation (the predecessor of Knox) which he confided to Dickinson on January 21, 1928, enabled him to retain control of Petroleum (391). For the same reason Dickinson sought possession and control of this same block of stock after Lloyd's disappearance on October 26, 1936 (692-93; 217-19) by demand of Dickinson, Sanderson and Rinke as "Trustees" under a purported Declaration of Trust by Lloyd (692; 723-26; 215-16; 218-19), for the delivery thereof. Inquiry ordered by the Petroleum Board as to the merits of such demand led to the disclosure of the Dickinson-Lloyd frauds, part of the subject matter of this litigation (723-26; 219).

During the years 1927 to 1929 Lloyd was engaged in extensive market operations in Petroleum stock, with Dickinson, his son-in-law Sanderson, and Rinke actively participating (695; 3139-41; 3142-44; 3145-47; 3148-50; 309; 411-12).

The stock market having collapsed meantime, Dickinson made demand upon Lloyd on May 5, 1931 for one-half of $27,310.28 or $13,655.14, with interest (415-16), although Dickinson had authorized Lloyd to use same for their joint account in stock market operations in Petroleum stock (696; 385-86).

C. The Decisions Below

"The acts through which the fraud was perpetrated on the Subscribers were not discovered until the early part of 1939. The intervenors, Vaughan and Burnham, served their answer and counterclaim in (the District) Court in January, 1944" (597-98), well within Section 48(5) of the New York Civil Practice Act.

In affirming the judgment below on the merits, the Court of Appeals, referring to the merits of the intervenors' counterclaim, said in part:

> "(Dickinson) has taken issue with a series of the findings by the district court and proffers, instead, an exculpatorily innocent interpretation of the events, skillfully woven from the documentary and uncontroverted evidence, on which he bases a claim of error in the findings. We are unable, however, to find grounds for holding these findings 'clearly erroneous' under F.R. 52(a)" (R. 1071; see also R. 1074).

SUMMARY OF ARGUMENT

POINT I

If important or novel questions actually exist in Petitioner's Class Action Argument their determination is not required in solving any controversy between the petitioners and respondents.

POINT II

Questions now presented—as to (1) applicability of Section 48(5) of the New York Civil Practice Act, (2) petitioner's demand for trial by jury of the issues raised by his answer to the claims of the subsequently intervening members of the class, (3) knowledge by Subscribers of fraudulent payments out of the Rinke Agency funds to petitioner (and Lloyd), (4) the Rinke "release", and (5) Petroleum, not the Subscribers, had the claim for the misappropriated Rinke Agency funds—were raised at the trial, considered and determined by the trial court, on all the facts and the law, in his exhaustive opinions which were unanimously affirmed by the Court of Appeals. Selected facts and construction thereof most favorable to petitioner should not serve as a basis for re-litigation.

ARGUMENT

POINT I

If important or novel questions actually exist in Petitioner's Class Action Argument their determination is not required in solving any controversy between the petitioners and respondents.

A.

The principal points relied on by petitioner (pp. 2-3; 17-23, pars. 1-4)[1] in the so-called "Class Action Argument" may be summarized as follows:

The decision below raises "important" and "novel" questions of federal law in that:

(a) the Court below said so.

(b) Difficulty was (and is) experienced in correctly classifying the type of these suits (i. e.—true; hybrid or spurious).

(c) The holding of the Court of Appeals that there was a fund (i. e. a constructive trust) is contrary to other decisions; and

(d) The holding violates due process requirements.

We shall demonstrate that if important or novel questions actually exist—their determination is not required in solving any controversy between the petitioner and respondents.

Petitioner was the plaintiff in an action begun in 1938 to impress a lien on stock of defendant Petroleum. Certain defrauded investors intervened. Their claims, based upon common questions of law and fact and seeking a common relief, were presented by two representatives of the

[1] Page references to petition are indicated "P".

class. This intervention was permitted by the District Court and consented to by plaintiff-petitioner.

The claim pressed by the class through their representatives was identical in scope to the counterclaim asserted by the intervenor, Petroleum, against plaintiff-petitioner.

As petitioner points out (Br. P. 8), the claim of Petroleum was dismissed by the District Court, in a decree labeled by this Court as "final". *Dickinson* v. *P. C. C.*, 338 U. S. 507, 94 L. ed. 299. So, too, were plaintiff-petitioner's claims. The District Court however, entered a money judgment in favor of the class and against petitioner and Lloyd's Estate. An examination of that decree, October 17, 1946 (R. 203-51) and order, April 9, 1947 (R. 252-4) will show that the trial court rendered a final determination of all issues between plaintiff and the class, and set the amount at $176,245.24 with interest, as in the decree set forth. At that point, had the Court (as it could have) directed the issuance of execution, that would have been an end to this case—except for the appeal on the merits, just decided adversely to plaintiff (197 F. (2) 973)—because the trial court's findings were not, as the Appellate Court pointed out, "clearly erroneous". Indeed, on any examination of the record, it would be impossible to reach any other conclusion.

If the Court had issued an execution against the plaintiff on the judgment in favor of the class, it could have provided for a retention of juridiction (the case was in equity) to determine any questions that might thereafter arise with respect to a division of any recovery on the judgment. That the Court retained jurisdiction to determine those questions *prior* to issue of execution, does not change the principle involved, namely that it was the *final determination of the trial court that members of the class were entitled to recover a fixed and determined sum of money from plaintiff*. At that point, all matters respecting the facts forming

the basis of that determination between all the *parties* (including the class), the amount of recovery and every other element necessary to support a *final* judgment had been resolved. Principles of *res adjudicata* applied.

> "A. What the court reserved was essentially supervisory jurisdiction over the distribution among the class of the recovery awarded the intervenors as the class' representatives. The only questions were, so to speak, internal to the intervening interest." *Dickinson* v. *Petroleum Conversion Corporation,* 338 U. S. 507, 514, 94 L. ed. 299, 304.

What followed was a determination *as between members of the class,* as to whom should share in the recovery already granted, and in what proportions, etc.

Such a proceeding, while grafted on to the main suit, was in every respect ancillary to it. It was similar to any situation where having determined in a litigation that defendant may recover against plaintiff the Court goes on to adjudicate between *defendant and others* (his assignee or some other undisclosed party in interest identified with defendant) who shall share in the recovery. Plaintiff has no need—nor propriety in controverting who ultimately may share in the recovery against him. His obligation to pay a sum of money to a person (collectively or individually) has been fixed. It would seem, therefore, that on such questions (i. e., the division of the sum awarded) plaintiff is not entitled to be heard.

So in the case at bar, Dickinson was required to pay to the representatives of the intervenors (Burnham and Vaughan) the sum of $176,245.24 and interest. If he paid that, he was forever protected by the judgment and payment thereunder.

Accordingly, examined in this light, we have this situation:

1. Representatives of a class of defrauded investors asserted a claim in a pending action and were awarded a judgment for money on the collective claim of all investors similarly situated (ordinary class action where one of a class asserts a right on his behalf and behalf of all similarly situated). There is nothing novel about that situation.

2. Having finally determined the right of the entire class against plaintiff—and all issues between the plaintiff and all members of the class (whoever and how many they may be)—the Court retained jurisdiction over the class representatives to determine *as between them and members of the class,* how the recovery (or judgment or "claim") should ultimately be determined. If that created a "novel" situation, it was a "novel" situation in which a determination was sought and accomplished, and such determination could have no bearing upon or relation to plaintiff.

Therefore, plaintiff-petitioner is in no position today to urge that decisions or determinations reached in that proceeding (or in that phase of the main litigation) involved any rights of plaintiff. If by the determinations below, error has been committed in apportioning the recovery, *as between members of the class*, that error cannot help or hurt plaintiff and, accordingly, the "novelty", if any exists in any question so determined, involved a proceeding (or phase of a proceeding) to which plaintiff was neither a necessary or proper party. Plaintiff cannot attack that proceeding but is limited in any attack to the questions: Did the trial court have jurisdiction to determine between plaintiff and the intervening class the issues it adjudicated? Are the findings in the judgment (or decree) entered on those issues, "clearly erroneous" under Federal Rule 52(a)?

It is submitted, that there is no novelty presented by such questions. On the contrary, the action and the issues determined fall within an ordinary fraud action which motivates a Court in holding in favor of those defrauded and against the instigator and perpetrator of the fraud.

Wholly in accord with the above indicated procedure of retaining jurisdiction after determination of all issues on the merits as between petitioner and the Subscribers—to supervise distribution of the recovery awarded among the members of the class—the trial Court ruled that such procedure would be limited to any question with respect to the right of any member of the class (his representative or transferee) to assert his claim as a holder of Rinke Agency receipts, or as a subscriber under the Rinke Agency agreements (1181-1184; 1203). The trial Court anticipated that the proof would be documentary (1201). An "answer" was not at any time subsequent to the decision on the merits "directed" by the trial Court, as stated by petitioner (P. 24).

Further, the order of the trial Court (972) does not "recognize" that petitioner could raise issue with respect to individual claims beyond the Court's said ruling. Nevertheless petitioner's contentions based on his "answer" were considered by the trial Court in his opinion on the individual claims of members of the class who intervened and disposed of adversely to petitioner (R. 468-500).

Although the motion to vacate petitioner's Interrogatories was granted by Judge Coxe nevertheless the trial Court subsequently permitted Interrogatories to be served on each subsequent intervener (2168). Significantly petitioner elected not to make such Interrogatories a part of his transcript of record on appeal. He therefore has no ground for complaint as to the personal factors of deception, knowledge and discovery of the facts.

POINT II

Questions now presented—as to (1) applicability of Section 48(5) of the New York Civil Practice Act, (2) petitioner's demand for trial by jury of the issues raised by his answer to the claims of the subsequently intervening members of the class, (3) knowledge by Subscribers of fraudulent payments out of the Rinke Agency funds to petitioner (and Lloyd), (4) the Rinke "release", and (5) Petroleum, not the Subscribers, had the claim for the misappropriated Rinke Agency funds—were raised at the trial, considered and determined by the trial court, on all the facts and the law, in his exhaustive opinions which were unanimously affirmed by the Court of Appeals. Selected facts and construction thereof most favorable to petitioner should not serve as a basis for re-litigation.

B.

The acts through which the fraud was perpetrated on the Subscribers were discovered early in 1939 and reported to Petroleum's Board February 9, 1939 (725). Interveners Burnham and Vaughan served their answer and counterclaim in the District Court in January, 1944 (597-8), well within six years of discovery under the New York Practice Act, Section 48(5).

Between Dickinson and Lloyd there existed a common plan or scheme to appropriate funds of the Rinks Subscribers to their own use through the medium of deceit (594). The claim which Burnham and Vaughan asserted for the Subscribers against Dickinson and Lloyd is for the payments made to Dickinson and Lloyd by Rinke as a result of such scheme, which was fraudulent in its essence (597). Their claim is not barred by the New York Statute of Limitations (598, 750, 761).

C.

From all the evidence the District Court found that the Dickinson-Lloyd plan or scheme whereby they misappropriated Rinke Agency funds was not disclosed to any Knox bondholders or Rinke Agency Subscribers and said bondholders and Subscribers had no knowledge with respect thereto (651-3; 492-5). If by "documentary evidence" petitioner refers to Dickinson's deed (which expressed the consideration) to the Texas City property, it is to be noted that Dickinson withheld recording of the deed (402-3); if he refers to the Subscription Agreements, it is to be noted that none refers to the sale of said property to Dickinson nor was there disclosure of payments to Dickinson or to Lloyd of any of the Rinke Agency funds subscribed (494-5). Petitioner does refer to a letter dated July 1, 1926 to the Subscribers as informing them of the balance due for the "liens" but that letter was unadulterated double talk, as the trial Court pointed out (478-88).

The fiction of the "liens" was used to screen the frauds of the Dickinson-Lloyd scheme from the beginning, and extended throughout the life of the Rinke Agency, and extended by Dickinson for purposes of deception until 1937 (434, 426-n, 423-n-426-n).

If "uncontroverted evidence" refers to testimony of Dickinson and Rinke (Lloyd had been declared dead at the time of trial (418) the Court said *inter alia*, "Dickinson and Rinke testified at the trial before me. They are unworthy of belief" (417-18).

D.

From all the evidence the trial Court found that the interveners, Burnham and Vaughan, did not release petitioner or Lloyd from any claims that they had against Dickinson and Lloyd (750).

When Rinks distributed Petroleum stock to the Subscribers in 1937, some ten years after the organization of the company and after Rinke Agency was terminated, he incorporated in his transmittal letter to the Rinke Agency receipt holders a "release" clause (495-501). It was no protection to Dickinson as a defense to the claim of Burnham and Vaughan, as interveners. It was not only without consideration to support it (502) but the Subscribers had been defrauded, and they did not know of the fraud when they signed the letter of transmittal (502-3). Moreover Rinke was performing a duty which he should have performed many years prior to 1937 (502) but failed to do so in deference to Dickinson and Lloyd who, like himself, were engaged in market operations in Petroleum stock in 1927-1929 (694-5).

E.

Petitioner likewise renews his contention that the Dickinson-Lloyd misappropriation, "if misappropriation there was", damaged Petroleum and not the Subscribers.

The Rinke Agency was not a capital-raising device for Petroleum. It expired November 15, 1926 with the termination of the Fifth Agency Agreement (632) and prior to the organization of Petroleum on December 14-15, 1926.

Despite Rinke's testimony as to transfer of the balance of Rinke Agency funds to Petroleum, his Agency Account discloses that on December 13, 1926, the day before Petroleum's organization meeting, Rinke paid by check from the Agency funds "to Wm. A. Fine, Special" the sum of $26,845.79 (2398). Rinke identified Fine's check, used two days later on December 15, 1926, whereby Fine paid Lloyd $25,000, the check being endorsed by Lloyd, "for deposit" (2907-9). Fine also was a tool of Lloyd's (458) and Rinke could not recall ever refusing to draw a check for Lloyd (2838-9). There is no record that Petroleum actually received any Rinke Agency funds.

Moreover, the Dickinson-Lloyd money frauds were consummated in 1926, during the life of Knox and prior to the organization of Petroleum.

Conclusion

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari be denied.

Respectfully submitted.

Dated: October 22, 1952.

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